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Integrating Consent-based Approaches into DMCA Takedown Notice Procedures

On October 4, 2023, the Federal Trade Commission (FTC) hosted several unions, publications, and advocacy organizations detailing the impact of generative artificial intelligence (GAI) systems on their professions.[1] The Writers Guild Association and American Federation of Musicians cautioned the displacement of writers and musicians who perform "work for hire" by GAI systems. SAG-AFTRA, National Association of Voice Actors, and Model Alliance representatives requested protections against contractual body scans and audio retention towards training GAI systems. Overwhelmingly, creative professionals called for legal protections and technical infrastructure that permit greater control over their artifacts and labor.

"Consent, credit, compensation, control," says Steve Zapata, a representative of the Concept Art Association. "This is what creators reasonably seek in this new era where our work will be used to add tremendous value to these new technologies." Umair Kazi, the Policy and Advocacy Director of the Author's Guild, outlines an approach rooted in fair compensation for creators whose works are used to train GAI systems, and whose names and work titles are incorporated into prompt engines; permission pathways between creators and GAI systems seeking to train models on existing works; disclosure of data repositories used towards training; and disclaimers for content generated by artificial intelligent systems. These approaches rely on a foundation of *consent*, defined as "knowing and voluntary," or "freely given, specific and informed."[2]

Licensing and contracts provide explicit permission pathways, outlining allowances for reuse of creative materials, as well as requirements for attribution and compensation. Consent is presumably granted by abiding by these terms. Otherwise, copyright holders may pursue removal of infringing material under Section 512 of the Digital Millennium Copyright Act (DMCA). DMCA takedown notices provide a measure of control for copyright holders, albeit requiring deliberate consideration to increase their collective efficacy in today's creative economy.

Identifying GAI systems in Takedown Notice Procedures

The Office may integrate consent-based approaches into the DMCA takedown notice procedure, allowing for identification of infringing uses involving GAI systems. General-purpose artificial technologies and foundation models are trained on large, unfiltered data sets, and designed for self-supervised learning and novel task achievement.[3,4] Copyright holders might identify the following:

(1) *Inclusion of copyrighted works in training data sets for generative artificial intelligence systems.* This indicates images/texts/audio used towards training models for which copyright holders have not provided express permission or whose existing permissions do not allow for their inclusion.

(2) *Appropriation of copyrighted works towards referential study in generative artificial intelligence systems.* This includes the use of copyright holders' names as generator prompts; and user submission of copyrighted works as reference material for generators to modify existing and

[1] Federal Trade Commission "Creative Economy and Generative AI;" https://www.ftc.gov/news-events/events/2023/10/creative-economy-generative-ai

[2] Richards, Neil M. and Hartzog, Woodrow, The Pathologies of Digital Consent (April 11, 2019). 96 Washington University Law Review 1461 (2019) , Available at SSRN: https://ssrn.com/abstract=3370433

[3] European Parliament. (2023). General-purpose artificial intelligence. European Union. https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/745708/EPRS_ATA(2023)745708_EN.pdf.

[4] Bommasani, R., et al. (2022, July 12). On the opportunities and risks of foundation models. Center for Research on Foundation Models (CRFM); Stanford Institute for Human-Centered Artificial Intelligence (HAI) Stanford University. https://arxiv.org/abs/2108.07258.

generate new visual/text/sound elements. These activities are done without permission by the copyright holder.

The use scope of GAI systems limits copyright holders' capacity to identify the breadth of infringing material. For example, a copyright holder may locate several users posting generated images or text closely replicating their material. This is possible by prompting a text or image generator with the copyright holder's names or copies of their works (*Appropriation of copyrighted works towards referential study in generative artificial intelligence systems).* Or, a copyright holder may locate their work in a training database for which opting-out is difficult or ineffective at pausing existing "downstream" uses *(Inclusion of copyrighted works in training sets for generative artificial intelligence systems).*

The following considerations are posed to provide record of emergent technology in takedown notice procedures and reinforce copyright holders' consent power:

➢ *Notice-filers may complete a survey indicating if a generative artificial intelligence system has contributed to an infringing use(s).* A DMCA notice of copyright infringement requires the description and identification of infringed copyrighted works; and description and identification of infringing material. Online service providers may provide an accompanying, optional survey inquiring:
  ○ If the copyright holder has sufficient belief that a generative artificial intelligence system has contributed to the infringing material.
  ○ If the infringing material involves the *inclusion of copyrighted works in training sets for generative artificial intelligence systems.*
  ○ If the infringing material involves the *appropriation of copyrighted works towards referential study in generative artificial intelligence systems.*
  ○ If the copyright holder wishes to make this information available to the alleged infringer.
➢ *Counter-filer may respond to claimed use(s) of generative artificial intelligence systems.* If the copyright holder makes the survey results available, and the alleged infringer does not remove the material, the latter may file a counter-notice **including whether or not the contested material involves the use of a GAI system.** Statements should be made in good faith belief.
➢ *Online service providers may provide definitions for "generative artificial intelligence systems."* These definitions should be consistent with consensus by governing bodies and stakeholders, as to provide accurate information to notice-filers and counter-filers.

Designated agents may confirm if copyright holders would like to make survey results available to alleged infringers for response, or if they wish to retain answers for online service providers' records. These mechanisms may hold parties accountable for disclaiming use of GAI systems in creative production and reuse, and online service providers accountable for documenting infringing uses involving GAI systems.

Takedown notices have the potential to be abused by a high volume of automated requests, as well as large studios and publishers exercising copyright protections where *fair use* may apply. Nonetheless, online service providers are tailoring takedown mechanisms to fit modern creators' needs. YouTube's Copyright Match Tool scans for reuploaded content, and helps channels take appropriate actions based on the sampled use. This tool is suited to its 2+ million Partnered Program channels, many of whom "experienced a higher amount of reposting of their copyrighted content," but were not necessarily movie studios, corporate publishers or service providers.[5] Differentiation of takedown

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[5] YouTube. (2022). YouTube Copyright Transparency Report H2 2022.
https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22_2022-1-1_2022-6-30_en_v1.pdf

procedures can provide crucial documentation of who files copyright notices and towards what purpose(s). A survey may allow online service providers to record instances of infringing use(s) involving GAI systems, and provide copyright holders further means of identification and reclamation.

Evolving Legal Frameworks

We find these calls consistent with the aims of the Office, as well as proposed regulation of generative artificial intelligence systems. The proposed **H.R. 3831: AI Disclosure Act** would "require generative artificial intelligence to disclose that their output has been generated by artificial intelligence, and for other purposes."[6] If passed, entities that fail to disclose outputs generated by artificial intelligence systems would violate the Federal Trade Commission Act clause regulating "unfair or deceptive acts or practices" (Section 5). Complementary legislation **S._ "No Section 230 Immunity for AI Act,"** if passed, would open service providers to civil action and criminal prosecution for claims involving the use of generative artificial intelligence systems.[7] The European Parliament proposes mandated disclosure of AI-generated content and synopsis of training data containing copyrighted material, pending officiation in the landmark **European Union AI Act**.[8] Recording infringing uses involving GAI systems is one way to hold developers and online service providers accountable to creators, users, and governing institutions.

Evolving Standards of Consent

The FTC'S "Creative Economy and Generative AI" panel provided a crucial opportunity for creators to express their concerns in a changing creative economy. Tim Friedlander, founding President of the National Association of Voice Actors, did not foreclose the possibility for GAI systems to facilitate his creative work, provided he retained "consent, compensation, and control" over his computer-altered voice. In this, *consent* must be closely evaluated with current data practices. Consent should be "knowing and voluntary." But legal scholars contend that digital service providers abuse *informed consent* through poorly communicated privacy policies, terms of service contracts, and notice and choice models.[9] These items become standards for user agreement, despite individuals not reading these documents or understanding the risk magnitude of data surveillance, aggregation or dissemination.[10] Thus, digital service providers often improperly obtain consent from users and contract parties.

Many data practices neglect to seek permissions for publically shared documents. "An example of this is LAION," says visual artist Karla Ortiz, credited on several Marvel Studios productions. "Specifically, its more popular LAION-5B, a dataset that contains 5.8 billion text and image pairs, which again includes the entirety of my work and the work of almost everyone I know." In lieu of two civil suits,[11] Stability AI offers an opt-out database for existing training images. "But because these AI systems can't unlearn," Steve Zapata counters. "This will only remove the images from future training datasets used by this one company and it's already too late to get out of the most current model." Subsequently,

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[6] H. R. 3831, Page 1. https://www.congress.gov/118/bills/hr3831/BILLS-118hr3831ih.pdf

[7] Hawley-No-Section-230-Immunity-for-AI-Act, Page 2.
https://www.hawley.senate.gov/sites/default/files/2023-06/Hawley-No-Section-230-Immunity-for-AI-Act.pdf

[8] European Parliament. (Updated on 2023, June 14). EU AI Act: First regulation on artificial intelligence: News: European parliament. EU AI Act: first regulation on artificial intelligence | News | European Parliament.
https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence

[9] Richards, Neil M. and Hartzog, Woodrow.The Pathologies of Digital Consent (April 11, 2019). 96 Washington University Law Review 1461 (2019) , Available at SSRN: https://ssrn.com/abstract=3370433

[10] Solove, Daniel J. "A Taxonomy of Privacy." University of Pennsylvania Law Review, vol. 154, no. 3, 2006, pp. 477–564. JSTOR, https://doi.org/10.2307/40041279.

[11] *Getty Images (US), Inc. v. Stability AI, Inc.; Andersen et al. v. Stability AI Ltd. et al.*

developers can still retain information (e.g. image and text embeddings, weight values) obtained from opted-out work. Some copyright holders report receiving reverse fines for attempting to opt-out work from *Have I Been Trained?*[12] Constructing large databases from the "open web" is contested. *Fair use* doctrine provides a defense for web scraping (see *Field v. Google, Inc.)*. But state proceedings limit that defense to non-commercial uses and public critique, and excludes web scraping towards an unfair market advantage from *fair use* defense (see *Associated Press v. Meltwater U.S. Holdings, Inc.*).

According to Lensa AI's privacy policy, users must own the content they upload and edit, and attain permissions from third parties before uploading photos to its service."[13] But there exist few mechanisms to verify permissions or filter out copyrighted material in GAI systems. For example, Midjourney allows users to upload and "blend" reference images without filtering copyrighted material or confirming image ownership. The potential to impersonate existing creators has led Adobe Inc. to advance the **Federal Anti-Impersonation Right**, or "FAIR" Act, for Congressional consideration. In theory, this proposal would protect artists from "intentional impersonation for commercial gain," such as prompting an artists' name in an image generator and selling the generated outputs without sufficient transformation of the original style.[14] This proposal follows users criticizing Adobe for training its Firefly image generator on more than 200 million images in Adobe Stock, without clarifying this use to Stock contributors.

Concluding Remarks

It is critical that creators feel empowered to publish creative works to the commons by acknowledging their right to permit and restrict certain uses of their work. Identifying GAI systems in DMCA takedown notice procedures through survey records provides one way to reinforce creators' consent power.

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[12] Xiang, Chloe. (2023, April 28). *A photographer tried to get his photos removed from an AI dataset. he got an invoice instead.* VICE. https://www.vice.com/en/article/pkapb7/a-photographer-tried-to-get-his-photos-removed-from-an-ai-dataset-he-got-an-invoice-instead

[13] Lensa App Terms of Use; "5. User Content." https://tos.lensa-ai.com/terms#:~:text=Your%20original%20content%20and%20your,when%20your%20Avatars%20are%20ready.

[14] Rao, D. (2023, September 12). *The Fair Act: A new right to protect artists in the age of ai: Adobe blog.* The FAIR Act: A New Right to Protect Artists in the Age of AI | Adobe Blog. https://blog.adobe.com/en/publish/2023/09/12/fair-act-to-protect-artists-in-age-of-ai