Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC

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In the Matter of	)
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Artificial Intelligence and Copyright	) Docket No. 2023-6
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<u>REPLY COMMENT OF THE COPIA INSTITUTE</u>

The Copia Institute follows up its initial comment in this study with this reply comment reiterating, in light of others' comments and subsequent discourse over the intervening weeks, the overarching point that copyright law is no solution to any of AI's potential ills, and attempting to use it as an obstacle to obstruct innovation threatens to impose its own harms.

As we said before, to avoid those harms care needs to be taken in how we think about AI, making it incumbent on us to separate the issues relating to providing input to an AI system from those issues relating to its output – or, in other words, the differences between training and using AI – because whether it is appropriate or harmful to react to those issues with regulation, especially regulation born from copyright law, depends on what is prompting the particular issue being addressed.

In the case of input, as we emphasized before, allowing copyright to obstruct the training of an AI system is itself harmful. One reason we cited is that it interferes with the right to read, and in particular the right to read with tools. If a person would have the right to read, or consume, a work themselves, then they should have the right to use tools to help them do that reading on their behalf. To say otherwise would jeopardize the ability to use any tools to consume copyrighted works, including any of the tools that may be necessary

to consume it, including devices aiding the consumption of physical media and the software enabling the consumption of digital.

This right and ability to use tools should also allow media to be consumed at any speed. No copyright owner in an LP has any right to mandate that the record not be played back at 45 rpm, for instance, or to not watch a movie on fast forward. Nor does a copyright owner have the right to restrict how much media someone can consume – after all, a voracious reader is free to read as many books as they want without penalty, and, indeed, we should want them to since the goal of copyright is to promote the exchange of knowledge, and exposure to the most knowledge produces the greatest educational benefit. But to say that AI cannot be trained by reading many works, at speed, because copyright prevents it would be to manufacture a power copyright holders historically have not had, and that AI systems tend to consume lots of works very quickly should not invite copyright law to apply. AI may be a different sort of tool than an analog one like a record player, and function differently as software than a something like a player program. But it is still just fancy software. And if we let copyright law say no to the fancy software getting to read works then we are also saying no to the tools people have long used to help them enjoy copyrighted works, and even the right to enjoy them at all.

While it may be true that what we can do with this fancy software may be new and different and raise various issues of concern, even if we are concerned with AI outputs –or how AI is used – those concerns cannot open the door to letting copyright law operate where it shouldn't operate. If it did it would be harmful in several ways beyond impinging on the right to read that even real humans depend on. For one thing, it will sabotage the technology, making it less adept to serve any productive use if the training ends up artificially limited. A large language model, for instance, needs to learn how humans speak if it is going to be able to attain fluencybias. If we restrict it to only a small set of human speakers it can learn from, then there will be significant gaps in its learned vocabulary and any utility it might have been able to offer will be inherently compromised.

Using copyright to prevent training also will not address any consequences of AI being used poorly or in dubious contexts. Regulatory solutions to those problems need to be targeted to those problems by regulation designed to deal with such harms. But problems like discrimination in hiring are not problems that relate to copyright, and copyright law won't solve them. In fact, to the extent that an AI system may display bias, that bias will be exacerbated by having been limited in its training, which means that applying copyright to inputs, and thus limiting training, will actually make many of the problems with AI worse, not better.

And, as we commented earlier, it will also distort copyright in harmful ways by giving copyright law a preclusive power it is not supposed to have. Which not only will affect the right to read but any non-AI related realm where copyright may legitimately touch. Indeed, many of the calls for copyright to prevent AI training tend to reflect some troubling undercurrents, such as the presumption that copyright owners can somehow get a veto on a use of their work if they do not like how that work is used. In the AI context it tends to mean that copyright holders are looking for leverage to stop AI systems from doing things that they may, even reasonably, think are bad. But a copyright is not supposed to be a veto power on all uses of the work. The use may not even implicate an exclusive right of a copyright holder, and to the extent it does, that use may still be fair. Users of works should never have to clear the hurdle of meeting the approval of a copyright owner before getting to use the work, but if copyright can foreclose AI training because the copyright owner does not like the use it would fundamentally change copyright law and allow owners to say no to uses even in the non-AI context if they didn't like them, no matter whether those uses could even possibly be infringing or were otherwise fair.

It would also fundamentally change copyright law if copyright owners could prevent uses of works because others made money off having used them. Making money from other works is not, as some commenters accused, "anti-competitive." If anything, it is anti-competitive for a copyright owner to prevent new businesses. There seems to be

some sort of moral objection running through comments like these, as though it must inherently be wrongful for anyone to ever profit from using works for free, but copyright never pivoted on whether money was made from a use, and to the extent that some courts have indulged this view it reflects a recent trend that itself distorts how copyright is supposed to work, as if a copyright owner was ever supposed to be entitled to every penny that any use of a work could ever earn.

The strongest objection along these lines seems to be that users of copyrighted works – AI developers, in particular – can have their own exclusive rights in what their AI can produce. But, again, it is not inevitable that copyright law need operate with respect to AI, even when it comes to output. Not everything must be owned, nor is it good for the public, or consistent with the goals and purposes of copyright law itself if everything is. Copyright is one of the laws intended to stimulate progress. But no progress is stimulated when copyright law does little more than supply ways to say no to it.

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Respectfully submitted,

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