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Under current interpretation of copyright law, it is understood that a human hand must be utilized in order for a work to be copyrightable. That question is becoming increasingly more difficult to answer with the ubiquitous use of artificial intelligence (“AI”). Large language models (LLMs) and other black-box AI models are used to create unique works that, if created by a human author, would assuredly be considered copyrightable.

The AI models that create a picture or text do so with billions upon billions of reference documents, usually ensuring that the output is not infringing upon any one author. This is a reasonable approach to AI models with respect to infringement of a work that appears novel.

The major question that arises is at what point does a work originally produced by an AI model but then altered by a human creator result in the work being authored by the human. In short, work produced by an AI model but substantially altered by a human to realize a new work should be copyrightable.

A notable example where the US Copyright Office handled this aptly was the consideration of copyrightability in the work *Zarya of the Dawn* (Registration # VAu001480196). The author of the Work used an AI model to create images inside the Work that she then photoshopped to, in essence, cleanup some of perceived blemishes in the picture. The images she edited should not be considered copyrightable. Yes, the author was instrumental in prompting the AI model to create the images. But, essentially, the author of the Work did not create the images herself. She did nothing creatively to realize the images.

Only when a work is effectively changed by a human author should the new work be copyrightable. The degree of change required should be similar to the degree of change required in current copyright law. This would impose creative responsibility on authors. Any other understanding of AI copyrightability could impose a severe lack of creativity required to create works.

Lastly, it is imperative to address the creators of LLMs and AI models that wish to capture the copyright of any work their models produced. This cannot happen. There is no doubt that it takes substantial time, effort, and resources to create an AI model. However, there are two reasons that disqualify AI model creators (like OpenAI, Google, etc.). Firstly, the models like ChatGPT/Bard/etc. are created as a black box. No one, including those that develop the models, understands exactly how these models produce an output. A work must be in a “fixed, tangible medium”. AI models clearly neither fixed, nor tangible. Thus, any work created by an AI model can never be considered a derivative work. Keeping these tools and their products available for public consumption rather than corporate control is imperative. Second, one must consider how these tools are used by consumers. Generally, these environments are used as tools for creators to realize work, research, or other endeavors. For the most part, these models should be considered as tools.

Though works ought to be considered on a case-by-case basis, AI produced works should be changed by a human author in order to be copyrightable.