Invited comments to United States Copyright Office at: [Federal Register :: Artificial Intelligence and Copyright].

Summary

Generative "Artificial Intelligence" (AI) presents a somewhat distinct set of concerns over intellectual property rights than other technologies which have led to previous disputes, litigation, legislation, and treaties.

The undersigned parties believe that generative AI systems can and often do infringe upon rights that should be held by human creators. However, these inherent human rights are not solely reducible to copyright interests, notwithstanding the specific regulatory domain of the United States Copyright Office.

Derivative Works and Originality

Preliminary declaration by both the United States Copyright Office and the corresponding European Union Copyright Office have taken positions that

- "Works" generated directly as outputs of AI or machine-learning systems cannot hold independent copyright, since they lack a sufficient modicum of creativity under a Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991) standard.
- The human-created (and generally copyright protected) works used as *training data* for generative AI systems are subject to sufficient transformation that their inclusion generally qualifies as fair use under the loose precedent of the Authors Guild v. Google 721 F.3d 132 (2nd Cir. 2015).

We believe that while the Feist-like limitation on mechanically assembled works is correct and should be formalized within legislative and regulatory rules, the interests of human creators is insufficiently addressed by an Authors Guild v. Google-like standard of transformative indexing.

In relation to our endorsement of a Feist-like limitation, we recognize that such a rule will ultimately probably need to be reconciled by treaty agreements with the conflicting rules in Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. Rules governing generative AI will certainly need to be international in scope to be effective, and the EU and US clearly take different approaches currently to "database rights" (which may or may not subsume the use of protected works as training corpora).

Rights Adjacent to Copyright

The signers of this note are not unconcerned with copyright interests in mechanically derived outputs from generative AIs. However, we believe that given the reality that large language models (LLMs) are trained on trillions of tokens (words), and image generation models are trained on hundreds of millions of individual images—as well as given an understanding of the indirect mechanisms by which training data inputs affect the specific outputs of such large models—the specific derived-work contribution of any single author to a generated output is of an extremely minimal degree.

Even if a hypothetical statutory licensing scheme were in place for fractional royalties on works used within training corpora, the actual monetary benefit to direct creators would be exceedingly small. The only real beneficiaries of such a hypothetical AI statutory licensing system would be large copyright cartels which control rights to millions of individual works (whether large publishers of texts, programming source code, images, moving images, sound recordings, or other tangible representations of creative works).

If technical mechanisms existed to assign proportional contribution of prior works from which AI generated outputs were created, this might tip the balance in the usefulness of statutory licensing to a minor extent. While such mechanisms are technically plausible, we believe that even if utilized, they would generally predominantly benefit copyright cartels and have little benefit to individual creators.

Trade Dress and Trademarks

Generated outputs from AI may infringe trademarks and trade dress concerns even if all inputs within training data fall within fair use, or even within the public domain. A well publicized example is AI image generators that include distorted versions of logos of stock image companies (some examples of this are currently being litigated in US courts). Even if we stipulate that use of the underlying images is sufficiently transformative to qualify as fair use, the inclusion of the *trademarked* logo element would not, and should not, gain such protection.

Trade dress concerns are generally similar, although we are not aware of any current litigation surrounding that issue. For example, if an image generating AI is asked to draw an automobile with certain characteristics, it might produce an image with protectible copyrighted elements specific to a particular automobile manufacturer *even if* the images used in the training set are themselves in the public domain or covered under fair use.

Moral Rights and the Right to Be Forgotten

In the European Union (General Data Protection Regulation §17) and in jurisdictions such as India, South Korea, Argentina, and Philippines, there is an enshrined “right to be forgotten” in database records. We perceive that “right” to cover having AI generated outputs similarly “forget” a human person’s contribution to the training corpora of those models.

The United States and China have mostly rejected a similar standard for a right to be forgotten, but only within particular cases of limited precedential effect, not conclusively in the case of the United States. This is an area where we believe harmonization at an international level is needed, and where the signers of this note believe an extension of rights in the direction of the EU would be desirable.

Moral rights in the United States, although somewhat covered by its signature to the Berne Convention in 1989 are largely limited to the concerns outlined in the Visual Artists Rights Act of 1990, and hence do not cover human creators in other media that may contribute to training data for generative AI systems.

We believe that moral rights—or something closely akin to their protection—especially a right to attribution of sources of material used in training generative AIs should be protected under United States law and by the Copyright Office. The question of whether any royalty would specifically attach with attribution is independent of the human dignity protection that comes with attribution itself.

Right to Publicity

Although in the United States, a *personality right* is protected at individual state levels (if at all) rather than within federal jurisdiction or precedent, we believe that generative AI presents new challenges to protection of personality rights that should be subject to regulation.

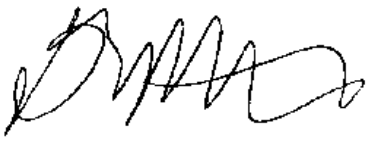
An output from a generative AI may either directly refer to the name, distinctive words, or likeness, or an individual, or may less directly reference stylistic or identifiable elements of an individual and their work. Even where an output is sufficiently transformative to fall under fair use exceptions from a copyright perspective, the representation may affect the personal dignity or economic marketability of an individual and their works.

While US law provides specific limitation to personality rights related to parody, such as those laid out in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), few outputs of generative AI will be reasonably construable as works of parody.

Rather, for example, if an image generation AI produces a visual creation using a prompt such as “in the style of <living artist>” the output may both reduce the economic value of works produced by the actual human artists whose style is imitated or by its derivation and poor quality border on defamation of that human artist. This harmful effect on the personality rights of individuals may occur whether or not their identity is specifically identified in the output, only assuming that the similarity is recognizable.

Concerns along the lines of personality rights are currently being actively litigated both in the case of visual artists and for recording artists whose vocal styles are relatively accurately imitated by generative AI programs. Those ongoing cases we are aware of resolve solely around potential royalty claims for what are arguably derived works; however, we believe that the United States should create a new and specific right around identifiable imitations or person that do not fall under parodic fair use, and which is at least partially independent of specific claims of copyright violation.

Signed,



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