FDRA
FOOTWEAR DISTRIBUTORS & RETAILERS OF AMERICA

December 6, 2023

The Honorable Shira Perlmutter
U.S. Register of Copyrights and Director
U.S. Copyright Office
101 Independence Avenue SE
Washington, DC 20559

Re: Request for Comments on Artificial Intelligence and Copyright (Docket No. 2023-6)

Dear Register Perlmutter:

The Footwear Distributors & Retailers of America (FDRA) writes to provide comments to the U.S. Copyright Office as it considers policy issues raised by artificial intelligence ("AI") systems. We recognize the importance of this stakeholder engagement in determining what regulatory and legislative actions are needed to address emerging AI technologies.

FDRA is the footwear industry's trade and business association, representing more than 500 footwear companies and brands across the U.S. This includes the majority of U.S. footwear manufacturers and over 95 percent of the industry. FDRA has served the footwear industry for almost 80 years, and our members include a broad and diverse cross section of the companies that make and sell shoes, from small family-owned businesses to global brands that reach consumers around the world.

Our member companies work hard to design, produce, and deliver shoes to U.S. consumers, with approximately 2.5 billion pairs of shoes entering the U.S. market every year. Footwear innovation is the cornerstone for U.S. companies to remain globally competitive, and it ensures that U.S. consumers have cutting-edge and high value footwear products. To safeguard this innovation – and preserve a strong environment of consumer trust – footwear companies devote significant resources to protect their intellectual property (IP) rights, including their trademarks and designs.

At the same time, as companies look to innovate, AI technologies provide an unprecedented opportunity to drive new creations and new value for consumers. Any emerging technology, however, brings with it a strong need to establish clear guardrails to ensure it is used properly and safely. As such, FDRA supports a balanced system that recognizes the benefits of technological advancements and tools to enhance creativity while protecting valuable IP rights.

FDRA believes that legislative and/or regulatory action may be needed to address the following issues that impact footwear companies and consumers:

1. Prevent the use of a company or brand's IP to train AI systems without authorization from companies.

IP laws, particularly those for copyright, trademark, and designs, provide protections for companies and consumers that must not be eroded with the use of new AI technologies. Safeguards should be in place that prevent a platform from uploading brand or company IP in the first place without consent. In selecting data to train or input into an AI model, the developer, deployer, or user must respect any

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IP rights or other restrictions on use that apply to that data. For example, developers may contract with a company who owns the rights to a large collection of digital images to use those images to train an AI image-generation model.

Ideally, there would be a technological solution for identifying data, images, and code online that is protected by IP rights to prevent AI from simply crawling the web and copying any materials found online without regard for the underlying rights. Such a solution may require mechanisms for a Generative AI platform to unlearn or detrain itself. If an IP violation is found after the data has been inputted into a Generative AI model as training data, there should be a mechanism to remove that underlying data from the dataset and re-train the model without using or learning from that data.

2. Protect the value and competitive advantage of a company's employees improving AI systems.

Footwear company employees are highly skilled and leaders in their field, especially when it comes to designing products and creating new concepts. The talent of these employees is the strength of our brands and our industry. This talent provides a competitive advantage that our member companies prioritize. Likewise, the data, images, or ideas a brand's employees choose to input into an AI model, including the language prompts used to guide a Generative AI model, have competitive value and should be protected. This information gives valuable insight into a company's design process and unique innovations of footwear brands. Similar to the protections of trade secrets under existing law, this process should not be denied protection simply because employees utilized AI tools in the creative process. The information input into these systems should be optional and transparent, and companies should have the ability to opt-out of providing any information.

3. Proactively prevent infringing images, trademarks, designs, and digital assets from being generated by AI systems.

AI tools should have filters and procedures that prevent the output of infringing content. This should include proactive and continuous checks for infringing content being uploaded into the system. These checks should identify infringing images before they are outputted.

AI systems can generate images that look like protected images and assets. For example, it is possible to request an AI image generator to create an image in the style of a Nike AirMax90 but without the Nike swoosh on the side. This could make it potentially difficult to immediately recognize the image as infringing given the removal of the trademark; it could nonetheless be a violation of a company's trade dress, design patent, or other protectable IP, for that style of shoe, a style that is recognized by consumers as a specific brand's product.

To address this issue, AI systems should proactively prevent the use of prompts that are likely to lead to potential infringement. These systems should also be able to review generated outputs. For example, AI systems should also restrict the use of trademarks as prompts and redirect users to generic terms. AI systems should have mechanisms to review content before it is outputted to prevent infringing images.

4. Establish a distinct system of protection for the creations generated by AI systems with the recognition of authorship of the human creator who used the AI system, provided that the degree of human intervention is enough to constitute a creative activity and does not otherwise infringe third party IP.

FDRA does not take issue with existing law that requires human authorship for the application of IP protection. However, human authors should be able to use currently available technology and tools (such as a camera) without necessarily losing their author status. The question has always been about the level of human intervention and creativity in the process to determine authorship rights. The same should be true for AI, including Generative AI.

5. Properly balance the above considerations with existing defenses to infringement (e.g. fair use, independent creation, etc.)

New regulations should be drafted in a way to protect IP and prevent abuses that rely on overly expansive applications of fair use or other infringement defenses to excuse infringement. At the same time, care should be given to ensure that existing infringement defenses, when properly applied, remain available.

Conclusion

Our industry stands on the cusp of innovations that will change the way global footwear manufacturers produce footwear and consumers purchase footwear. Now more than ever it is vitally important that the U.S. government work to protect these innovations, designs, brands, and images globally.

AI systems provide a significant opportunity for businesses to drive productivity, efficiency, and creativity; they also pose a significant threat to U.S. businesses and U.S. consumers if they are used in a harmful way or undermine IP rights. The Administration and Congress must work to find policy solutions that address the challenges created by new AI systems, particularly as they relate to IP rights. A strong IP environment is critical for our businesses to succeed and remain globally competitive. This environment directly impacts jobs and communities across the U.S.

FDRA appreciates the opportunity to provide comments to the Copyright Office on policy issues raised by AI systems. We look forward to working with the Administration on this critical issue.

Sincerely,

Matt Priest
President & CEO
Footwear Distributors & Retailers of America (FDRA)