

United States Senate

WASHINGTON, DC 20510

October 30, 2023

VIA U.S. COPYRIGHT OFFICE PORTAL

Hon. Shira Perlmutter
Register of Copyrights
United States Copyright Office
Washington, D.C., 20540

RE: August 30, 2023 Notice of Inquiry and Request for Comments

Dear Register Perlmutter,

I write to provide my perspective on the intersection between copyright law and the policy issues raised by artificial intelligence (AI) systems. In many ways, artificial intelligence can best be described as “the good, the bad, and the ugly.” Particularly in the context of healthcare, logistics, and manufacturing, AI can be used a force for good. Likewise, artificial intelligence can also present significant benefits to the creative community. However, in this comment, I outline several challenges that generative AI systems can present to creators, and considerations for addressing those challenges. Specifically, in assessing whether legislative or regulatory steps are warranted, Congress and the Copyright Office must keep the following policy goals in mind: (1) ensuring that creators’ works maintain the intellectual property protections they deserve; (2) implementing fair compensation standards for AI copyright infringement; (3) ensuring that any federal right of publicity standard adequately protects the rights of our creative community; and (4) protecting against global AI threats to American copyrighted works. Strong intellectual property rights are at the core of American innovation, and in this new age of AI, it is critical that we work diligently to protect them.

Protecting Creators’ Intellectual Property Rights

The Constitution enshrines strong property rights for artists, authors, and other creators to ensure that their works are protected.¹ It is essential, then, that we strive to guarantee that these protections continue to exist and thrive in the era of AI. In particular, protecting the musical works of songwriters and artists has never been more important. From Music Row to Beale Street to Broadway, Tennessee’s creators have made their mark on the music industry, and they—along with all creators protected by the Constitution—deserve to know that their property rights will not be infringed and that their works will not be improperly used by artificial intelligence.

A cornerstone of U.S. copyright law is that copyrightable works must be created by a human being. The Supreme Court has on numerous occasions recognized the human authorship requirement.²

¹ U.S. CONST. art. I, § 8, cl. 8.

² See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); *Mazerv. Stein*, 347 U.S. 201 (1954) (stating that a copyrightable work “must be original, that is, the author’s *tangible expression of his ideas*.”) (emphasis added). It is also worth noting that the Copyright Office has taken the position that copyrightable works must be created by a

In turn, the nature of generative AI presents serious questions as to whether these programs are sufficient to constitute human authorship. While I agree AI's effect on the human authorship requirement is a significant issue that must be addressed, that question continues to make its way through the courts. Regardless of how this issue is ultimately resolved, Congress and the Copyright Office must ensure that creators' works maintain the intellectual property protections they deserve and that the Constitution requires.

Fair Compensation for Infringement

The focus of any inquiry into artificial intelligence and copyright must be on ensuring that creators are fairly compensated when their protected works have been infringed upon by AI—particularly generative AI systems. Federal law makes clear that a copyright owner is entitled to recover actual damages as a result of infringement.³ Proponents of generative AI systems, however, have argued that using copyrighted works to train AI models constitutes fair use. In my view, improper application of the fair use doctrine often becomes an opportunity to steal copyrighted works. That is precisely why I argued for a narrowed application of the fair use doctrine in an amicus brief to the Supreme Court in *Warhol v. Goldsmith*. Moreover, it is my belief that unlicensed AI ingestion of copyrighted works should not constitute fair use when the AI output supplants or competes commercially with the human-created works it was trained on. This is a particular problem that generative AI presents to musicians, songwriters, actors, publishers, and so many more in Tennessee and throughout the nation. . For that reason, I urge the Copyright Office to work with stakeholders from the creative community on potential solutions to address this pervasive problem.

The creative community by nature is not monolithic. While some creators oppose generative AI being trained on their works in all contexts, there are others who would consent to such use under certain circumstances. It is clear, then, that copyright owners must have the ability to decide whether, how, and on what terms their works are used by AI developers to train these systems. For that reason, the Copyright Office should examine the potential utility of an AI licensing regime that will benefit copyright holders and ensure that their rights are not infringed. In the context of copyright generally, licensing is an effective vehicle for copyrighted works to be more widely used while simultaneously providing for fair compensation to creators. While I will reserve judgement on what that licensing mechanism could look like, I am unconvinced of the utility of compulsory licensing to appropriately protect creators and their works. I urge the Copyright Office to engage with relevant stakeholders about the most effective licensing regime that will benefit all creators.

Federal Right of Publicity Law

Another issue I urge the Copyright Office to consider is whether a federal right of publicity standard is warranted. For years, numerous states, including Tennessee, have protected individuals from misappropriation of their name, image, likeness, and voice.⁴ This right of publicity—a core

human being. See <https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright-registration-guidance-works-containing-material-generated-by-artificial-intelligence>.

³ 17 U.S.C. § 504(b).

⁴ See, e.g., TENN. CODE ANN. § 47-25-1103 (2014) (“Every individual has a property right in the use of that person’s name, photograph, or likeness in any medium in any manner.”); CAL CIV. CODE § 3344 (“Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services,

property right—has exclusively existed through state laws, with no uniform federal standard. In total, 25 states have enacted laws protecting an individual’s right of publicity in some form. Among those state laws, there is a significant discrepancy regarding the scope and duration of this right, and I encourage the Office to provide specific input on a federal right of publicity—especially as it relates to the intersection of copyright and AI.

Generative AI presents unique challenges to creators’ publicity rights. Specifically, while there are numerous ways in which the right of publicity has been—and will continue to be—infringed, the lack of transparency in the training of these AI models presents unique challenges that require tailored solutions. Therefore, the Copyright Office must consider how best to protect creators’ ability to profit off their name, image, and likeness (NIL)—specifically as it applies to generative AI. There have already been numerous high-profile instances of generative AI being used to replicate creators’ NIL, and the danger to their livelihoods is real and present. Given the proliferation of social media and other online platforms, these unauthorized recreations have the potential to be viewed by millions of individuals in a matter of seconds, and there is currently no process in place to ensure that platforms are removing these digital replicas expeditiously.

For those reasons, we must implement safeguards to protect artists from infringement and ensure that the United States remains the global hub for entertainment.⁵ Specifically, individuals and companies who produce unauthorized digital replicas of an individual in a performance must be held liable. The platforms that host these non-consensual digital replicas must also be held liable if they have knowledge of the fact that the replica was not authorized by the individual depicted. This liability must be balanced, of course, by significant protections for any applicable First Amendment rights. The creative community, online platforms, and generative AI users all stand to benefit from clear safeguards to protect creators’ NIL.

Global Threats to U.S. Copyrighted Works

We know that the United States must diligently work to protect Americans’ intellectual property from infringement by foreign bad actors—namely the Chinese Communist Party (CCP). We would be naïve to assume that China will not leverage every tool at its disposal, including AI, to stifle American innovation. Generative AI, with all of its potential, has accelerated the race for global dominance in the intellectual property space in unimaginable ways.

The CCP has been attempting to steal our intellectual property for decades, and the emergence of AI is yet another way for Beijing to attempt to assert its dominance in this space. China has

without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof . . .”).

⁵ For an example of such effort, see <https://www.coons.senate.gov/news/press-releases/senators-coons-blackburn-klobuchar-tillis-announce-draft-of-bill-to-protect-voice-and-likeness-of-actors-singers-performers-and-individuals-from-ai-generated-replicas#:~:text=The%20NO%20FAKES%20Act%20would,of%20the%20individual%20being%20replicated>. The authors of this discussion draft—Senators Coons, Tillis, Klobuchar, and I—welcome any feedback that the Office may have.

identified AI as one of its seven key areas of industrialization in its Five-Year plan,⁶ and we know that China will only use these new capabilities for nefarious purposes. As an example, TikTok's parent company, ByteDance, has begun to build a U.S.-based infrastructure for their AI industry. According to reports, they have hired specialists to develop an AI music application that creates music and has audio editing capabilities.⁷ If given the chance, the CCP will undoubtedly use this infrastructure to steal our artists' copyrighted works and harm our creative community. Thus, in undertaking this inquiry, I urge the Copyright Office to examine the dangers presented by foreign bad actors and ways that the United States can protect the creative community from those that wish them harm.

CONCLUSION

Artificial intelligence presents numerous new possibilities and challenges to our daily lives, and—in the context of copyright law—we must be diligent in ensuring that creators are at the forefront of these policy discussions. Tennesseans are rightly concerned that our rich history as a cultural mecca for music and entertainment is at risk, and I know that individuals across the country share the same concerns.

This notice of inquiry is a positive first step toward protecting the creative community's copyrighted works, and I applaud the Copyright Office's proactiveness. Generative AI is a rapidly evolving issue, and there is not just one solution. That is why we must not act in haste; Congress must take initial, commonsense steps to support our creators. We must ensure that creators are fairly compensated, namely by codifying NIL protections in the context of generative AI. We must also engage relevant stakeholders in discussions regarding the most appropriate licensing schemes for the use of copyrighted works in the training of generative AI models. Further, we must reject the CCP's goal of global AI dominance and dominance in the technology sector generally. The twenty-first century can be another American Century, as long as the U.S. remains at the forefront of technological developments and copyright protections. We must work together to build broad consensus across the Congress to foster American ingenuity. Our status as the global leader in entertainment, creativity, and culture demands it.

Sincerely,



Marsha Blackburn
United States Senator

⁶ *The Next Frontier for AI in China Could Add \$600 Billion to its Economy*, MCKINSEY (June 7, 2022), <https://www.mckinsey.com/capabilities/quantumblack/our-insights/the-next-frontier-for-ai-in-china-could-add-600-billion-to-its-economy>.

⁷ Daniel Tencer, *TikTok's Parent is Working on an AI Music APP That 'Significantly Lowers the Music Creation Barrier'*, MUSIC BUSINESS WORLDWIDE (May 2, 2023), <https://www.musicbusinessworldwide.com/tiktoks-parent-is-working-on-an-ai-music-app-that-significantly-lowers-the-music-creation-barrier/>.