Comments of Gary Shapiro
Consumer Technology Association
U.S. Copyright Office
Library of Congress
Artificial Intelligence and Copyright
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CTA represents over 1000 of America's most innovative and creative companies of all sizes, in many and diverse markets. In all of these markets, technology companies create both extraordinary opportunities and complex challenges for the creative community. Indeed, as new methods and products emerge, the lines between technical innovation and expressive creation blur or disappear entirely, within entities as well as industries. For example, content creators increasingly use online platforms to distribute their content, create new revenue streams, and build direct relationships in spheres of education, information, and entertainment.

As a trade association, CTA takes a broad view of techniques, opportunities, risks, and challenges, as experienced and advised by its members. CTA's answers to this Inquiry are framed by this broad view, rather than by specific trade or commercial experiences of members, for which CTA would provide no forum for sharing or discussion.

The Innovative and Creative Promise and Potential of AI

Art, culture, and technology advanced along with the written word and the printing press. Yet the act of reading has never infringed copyright, nor have families been precluded from encouraging multiple people to read the same book. Communities invested in libraries to democratize education, and universities have similarly enabled scientists and artists.

As technology has moved from broadcast home storage to online distribution and user-generated content, copyright controversy has followed, but core copyright principles have proved equally adaptable. The online world introduced search and data tools that have quickened the pace of reference and research for students and many others in careers and in daily life. Now, as empowered by generative artificial intelligence, these tools can further serve and democratize innovation, art, culture, and education.[1] But new and novel burdens on machine reading and learning through generative AI could slow human progress and (as just one example) impair potential gains in health, longevity, and equitable access to healthcare.[2]

[1] Self-driving vehicles rely on AI but must follow existing traffic laws. It will be matters of non-copyright policy to assess whether mandates for human drivers, such as a steering column, dashboard, and other costly and potentially unnecessary controls, still make sense (just as in early days of autos, some local laws required them to be preceded by a human with a red flag).

[2] These technologies will allow quick access to all research in any given set of symptoms or maladies and, with access to anonymized medical records, allow rapid creation of individual treatment plans based on an individual's unique situation, including maladies, genetic code, sex, race, age, location, blood type, diet, and physical condition. Copyright-based restrictions on access to machine reading could hinder more effective and personalized medical treatment. Moreover, such tools can help predict the future course of

The Importance of Balanced Copyright Law

CTA continues to believe, as it did when a fundamental innovation emerged four decades ago, that courts should get the first crack at dealing with innovations that perturb rights holders. Copyright fair use remains their essential tool.

The Constitutional purpose of intellectual property law is to spur innovation by rewarding limited monopolies to creators for limited times.[3] When a federal court, later reversed by the Supreme Court,[4] held it to be a copyright violation to market a device empowering consumers to enjoy lawfully received content at their own convenience, CTA's antecedent joined with consumer, public interest, and trade groups to seek a more balanced result. In the period between the lower court's holding and the Supreme Court's reversal, some advocated for artificial measures of recompense, such as levies payable to collection societies and distributed to rights holders based on current popularity. CTA agreed with House Judiciary IP subcommittee Chair Robert Kastenmeier that it was best to wait for the Court to address this novel question. The Court turned to the existing doctrine of *fair use* – created by judges and later added to the U.S. Code as 17 U.S.C. § 107 – to hold that it is consistent with copyright law to record these works for limited purposes and effects. Hence, marketing a device with a significant use of enabling such activity was not an infringement.

The *Betamax* case did not resolve the legislative debates or, as technology and innovation advanced, ensure holdings of fair use in all ensuing cases. But reliance on fair use did help ensure that innovation could still occur. As content owners themselves have become empowered by innovations, and device and platform innovators have become major copyright proprietors, the importance of balanced copyright law has remained.

The Office's General Questions

CTA understands this inquiry to be about interpreting the Constitution and Copyright Act as applied to Office core responsibilities: initially determining copyrightability, and making recommendations about whether to revise the Act. Participants cannot ignore prospects for social benefits and harms, but the Office and the courts are constrained by the Constitutional purpose of copyright – to promote the progress of science and useful arts, securing for limited times to authors … the exclusive right to their respective writings.

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viruses, and hasten the development of targeted vaccines. *See* NATURE, *How AlphaFold and other AI tools could help us prepare for the next pandemic*—Researchers are using machine-learning programs to predict the evolution of viruses and design vaccines, Oct. 11, 2023.

[3] art. I, § 8 cl. 8.

[4] *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). ("Betamax" case) *Betamax*, was marketed in 1975 as the first video recorder for consumer use. A claim of secondary liability was rejected by the District Court in 1979 based on fair use and the First Amendment, but the Court of Appeals reversed and remanded, with an instruction to explore compulsory license as well as damage relief. In 1984 the Supreme Court reversed, holding (1) the product enables fair use, and (2) placing in commerce an item with both infringing and fair uses should not, without more, be subject to secondary liability.

As cabined by core copyright principles, both the promotion of creativity *and* respect for the Public Domain should frame the Office's decisions and recommendations. The Public Domain should be understood as embracing not only works whose granted protection has expired, but also – and fundamentally – ideas, data, methods of operation, titles and attributions, elements or portions of expression (including music), and any other material that has never been eligible for U.S. copyright protection. *The Public Domain includes rights of users, such as the rights to see, read, listen, and learn*. (These rights do not necessarily include a right to acquire or to gain access.[5])

Benefits. The benefits of AI technology will not be limited to works that benefit from training. AI engines have the potential to be broadly democratizing tools in research, education, and the arts, including greater access to ideas and information that are not easily visible in protected works or in the Public Domain.

- More specifically, the Office is correct to assess separately the prospects for training and for potential infringement.
- Reading and writing by (or controlled by) humans has comprised the corpus of experience and data available to the Office in this Inquiry. AI aids and their benefits will not always be comparable or analogous to human activity and experience, but it is human experience and creativity that provide the dataset and principles with which we start.

Risks. CTA believes that the Office's inquiry should begin with the presumption that any copyright-related risks from training must be considered only in the context of *infringement by resulting works*. Therefore, assessments of potential liability for training practices themselves should depend on principles of secondary liability as developed and applied by courts.

- On a voluntary basis, there has been consideration of "best practices," analogous to those that have been suggested with respect to orphan works[6] and fair use.[7] (CTA has not to date developed any best practice guidance with respect to training.)
- CTA believes that copyright, as a tool for addressing societal risks such as future AI dominance or job dislocation in general, seems either inadequate or *potentially an impediment*. The future, in such respects, remains cloudy.[8]

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[5] Rights to acquire physical works are governed by property law; rights of access with respect to expressive digital works are addressed by the Digital Millenium Copyright Act (DMCA).

[6] *See, e.g.,* Society of American Archivists, ORPHAN WORKS: STATEMENT OF BEST PRACTICES, Rev. June 17, 2009.

[7] *See, e.g.,* Association of Research Libraries, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES, Jan. 2012.

[8] It may equally be argued that unique U.S. constraints on machine reading would impair U.S. competitiveness. It is for the Congress, not the Copyright Office or copyright law, to balance such concerns.

Papers / studies. Recent Senate testimony by Prof. Matthew Sag provides an appropriate initial perspective.[9]

Other countries. The examples noted by the Office embrace regimes in which training alone might at least arguably be considered an infringement, whereas the weight of U.S. precedent and opinion (as discussed below) is that this is not the case. Other regimes vary in other respects, such as providing remedies for moral rights. Nor do most regimes specifically embrace fair use. However, without necessarily endorsing any one proposal, CTA notes:

- The weight of such legislation has favored access and use of publicly distributed copyrighted works for learning and understanding by machines for AI training, to create clarity and remove obstacles to realizing AI's promise.
- The European Union, the only jurisdiction to enable an opt-out mechanism, has limited that right with the object of leaving critical research and development unimpeded.[10]
- No jurisdiction has imposed a licensing scheme – a recognition that training AI models on publicly accessible materials does not necessarily impact legitimate interests and expectations of creators.[11]

Training

It is clear in the law, and as we discuss at the outset, that *reading* alone (even by humans capable of verbatim memory and recitation) cannot be the basis of a claim of infringement.[12] AI training affords an additional step of storage, which varies according to purpose, completeness, and further processing. Copyright precedent in general holds that where the storage is ephemeral or transitory and for a lawful purpose, the storage itself should not be considered an infringing reproduction.[13] It is only at a following stage that activity analogous to a human's reading, thinking, *and then writing or performing* should raise potential for copyright remedy.[14]

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[9] "Artificial Intelligence and Intellectual Property – Part II: Copyright and Artificial Intelligence" July 12, 2023 Matthew Sag Professor of Law in Artificial Intelligence, Machine Learning, and Data Science Emory University School of Law ("Sag").

[10] *See* Article 3, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL LAYING DOWN HARMONISED RULES ON ARTIFICIAL INTELLIGENCE (ARTIFICIAL INTELLIGENCE ACT) AND AMENDING CERTAIN UNION LEGISLATIVE ACTS.

[11] *See also* Sag, nn. 24 & 25.

[12] As noted above, user rights re "reading" do not necessarily include rights to acquisition or access, which in U.S. law are addressed by means other than copyright.

[13] *See discussion, CDK Global v. Brnovich,* (9th Cir. 2021); Association of Research Libraries, FAIR USE IN THE ELECTRONIC AGE: SERVING THE PUBLIC INTEREST, Jan. 18, 1995.

[14] As a trade association with diverse membership that includes direct competitors, CTA does not collect specific information on training (or other business) approaches and techniques, or on company-specific market outcomes.

- A writing influenced by a copyrighted work, or even ingested so as to produce an *idea*, does not encounter copyright remedies.
- Where the idea and ingested material are then expressed in a work claimed to be similar, the doctrines of *scènes à faire* and "thin copyright" must first be considered, to determine whether *any* copyright protection is appropriate, and if so, the scope and extent.[15]
- If a potentially infringing output nevertheless emerges, fair use analysis applies.
- Nothing in *Warhol, Oracle,* or other recent precedent provides any basis to assume a change in the way courts will make determinations of whether a use, if infringing, is excepted from liability as a fair use, based on its purpose, character, amount, transformative nature, and other considerations.

In the absence of any further development of case law, the Office should not make any recommendation for the Congress to pursue impositions of opt-outs, licensing, record-keeping, etc. Any such recommendation pertaining to the Office's responsibilities would need to be copyright-based. Hence it would need to be based on a determination that training is an infringement. In the absence of any such clear pronouncement by courts, such regulatory impositions would likely be obstructive to both innovation and creativity, hence mischievous and misguided.

Copyrightability

The Office's approach to registration, as stated in its initial guidelines, is sound. We agree that, whatever policy options might be proposed or considered as preferable (we do not suggest any), the Constitution requires both human input and human-based ownership.[16]

In recognizing that elements of human creativity must be isolated from those that are artificially generated, the Office has outlined a necessary but daunting task. CTA expects that for purposes of *registration*, precedent dating back to the emergence of photography and sound recordings will be the baseline. Based on such precedent and practice, the initial safe course would seem to be to "err" on the side of granting registration, and let the courts sort out whether the work reflects sufficient human creativity. HOWEVER, there is a large potential cost to this approach, which must be considered in any potential recommendation to the Congress:

- Successful registration enhances opportunities to claim statutory damages on a potentially ruinous basis.[17]

[15] *See, e.g., Nichols v. Universal Pictures*, 45 F.2d 119 (2nd Cir. 1930); discussion, *Structured Asset Sales, LLC v. Sheeran*, 18 Civ. 5839 (LLS) (S.D.N.Y. Sep. 29, 2022). CTA is not suggesting that at this stage the Office formalize such court-created doctrines, relative to infringement, as screens for registration – *see* discussion of Copyrightability, below.

[16] With respect to ownership, any deviation from the Office's current approach in determining the human element would likely require a change in the Copyright Act. *See* Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 2012 STAN. TECH. L. REV 5 ¶ 68.

[17] 17 U.S.C. . §§ 412, 504.

- CTA has consistently advocated for statutory damage reform, to remove the intimidation factor from litigation brought, or threatened, against innovative entities, particularly where new technologies and "grey areas" of copyright law are involved.[18]
- Just as weak patents in the hands of "trolls" have burdened innovators and courts, such "weak" copyrights will have the same potential. **Thus, CTA urges that the Office include a strong recommendation for statutory damage reform in any advice to Congress**.

As we discuss above, we expect the steps taken by courts will be:

- Determine copyrightability with aid of existing doctrines, such as *scènes à faire*.
- Determine scope, based on substantial similarity and "thin copyright."
- Determine whether an exemption, such as fair use, applies.

Revising the Copyright Act. Given the tasks now facing the Office and the courts in applying existing precedent and fashioning new outcomes, it would seem radically premature for the Office to recommend statutory changes at this time. Therefore the Office should refrain from recommending either a broadening of the standard for registration or any change to copyright doctrine – either as to training or as to infringement by AI-generated or AI-assisted works.

***Sui Generis* protection**. The history of *sui generis* approaches has been that as technology advances, they either quickly become obsolete (e.g., Semiconductor Chip Protection Act of 1984[19]), or may raise uncertainties and impediments pertaining to copyright.[20] Therefore CTA urges caution in such respects.

Infringement

In human authorship, it is rare for content creation to lack any derivation from existing literature or music, directly or as passed down over generations in written or oral tales, folk music, or religious observance. *But*, in the absence of *substantial similarity to a particular work*, content cannot be said to infringe. In this sense AI-generated and influenced works are similar: The fact that they reflect training on writings or music does not itself make them potentially infringing. There must still be a tie to a particular in-copyright work, and in this respect, because of how they are trained, *AI-influenced works may be less likely to infringe*.

[18] *See, e.g.*, CTA letter to Hon. Thom Tillis, Senate Judiciary Committee, March 5, 2021. "If copyright law is to be reviewed, so must its **statutory damages** provision, which was written for another era. CTA has long argued that U.S. copyright law's statutory damage provisions are grossly out of scale in an era of diverse content distribution and grey-area theories of infringement." (emph. in original)

[19] 17 U.S.C. §§ 901 – 914.

[20] The DMCA is now 25 years old and was based on at least a decade of comment, proposal, and treaty. Yet controversy swirls as to its interaction with copyright law, and even the Office has not yet felt to be in a position to comment, where both DMCA and copyright issues are in question, on whether a device owner enjoys ownership of embedded software. The online "safe harbor" provisions also remain controversial. (CTA is not suggesting the DMCA was a mistake – only that adding *sui generis* provisions can complicate, or even impede, already complicated copyright determinations.)

- There may be limited instances in which certain finely trained models, prompted with specific instructions, could produce works that might qualify as derivative in the copyright sense because these new works contain protected expression of the training data.
- But in most use cases, the output of works generated by AI models is largely informed by the content and context of a user's prompt and shaped by patterns, probabilities, and processes of the trained AI model. *Given the vastness of training data in most AI models, the role of any specific work is usually negligible*. What is "derived" from any work is a weighting of probabilities for unprotected facts, patterns, systems, methods, etc.[21]

When a claim of infringement can be supported materially, the analysis by courts is then whether the amount "taken" was itself copyrightable (*scènes à faire* and thin copyright in music[22]), whether there is substantial similarity, and whether an exemption such as fair use applies. CTA does not see a reason to believe that these tests and doctrines are inadequate.

Proof and assignment of liability. Existing civil discovery rules should have a chance to play out in pending and future litigation. Courts will develop records to assess direct & secondary liability if warranted.

Volitional conduct. Liability for infringement requires *volitional conduct*.[23] To the extent infringement by a resulting new work is found, it will be up to courts, given the facts of each case, to assign volition (whether re prompt or work) based on established principles of *intent, rather than mere knowledge or capability*.

Open Source. AI offers great potential benefit, particularly in educational settings, for free products to be made available for creative use. It is common practice, as in Creative Commons licensing,[24] for contractual requirements to be attached. The outcomes have been generally beneficial.

Section 1202(b). To the extent relevant, existing case law appears sufficient.

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[21] *See* Sag at 3 – 6.

[22] Indeed it is a fair question whether these should be considered different doctrines depending on form or format. *See* Torrean Edwards, *Scènes à Faire in Music: How an Old Defense is Maturing, And How It can be Improved*, 23 Marq. Intellectual Property L. Rev. 105 (2019).

[23] *See, e.g., BWP Media USA Inc. v. Polyvore, Inc*, 922 F. 3d 42 (2d Cir. 2019). Volition implies human consciousness, will, and choice. *Cf.* Itzhak Fried, Patrick Haggard, Biyu J. He and Aaron Schurger, Volition and Action in the Human Brain: Processes, Pathologies, and Reasons, Journal of Neuroscience, 8 November 2017, 37 (45) 10842-10847.

[24] *See* Creative Commons, About CC Licenses.

Labeling or Identification

It seems premature to devise any labeling / identification scheme. Any such scheme would carry the substantial possibility of impeding commerce, education, and innovation.

Additional Questions

Names or likeness. Potential circumstances are too diverse to depart from existing federal and state law in advance of case law experience. Federal legislation would be premature and likely redundant.

- Existing state regimes have mechanisms to address many of the concerns raised by generative AI, and state legislatures and courts should have the opportunity to apply those regimes before any federal legislation is considered, if at all.
- Similarly, companies, individuals, and guilds are actively resolving concerns raised by the use of generative AI in ways that may inform state legislators and courts.
- Much of generative AI is protected by the First Amendment. Courts have a long, complex history of sorting through the collision between constitutional values and state publicity rights; layering on a federal tort for AI would likely add confusion.

Section 114(b). Narrowing the language quoted from this provision would likely generate unproductive litigation against artists who can least afford it and would threaten the Public Domain.

CTA appreciates this opportunity to provide its views.

Respectfully submitted,
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