U.S. Patent and Trademark Office
Request for Comments on
Intellectual Property Protection
for Artificial Intelligence Innovation
Docket No. PTO–C–2019–003
Comments of the Consumer Technology Association

The Consumer Technology Association ("CTA")[1] applauds the PTO for focusing on the intellectual property challenges posed, and the benefits for innovation offered by, artificial intelligence (AI) technologies. Balancing the potential for innovation against IP and privacy considerations will be a worthy task. The PTO took a step forward with its January 31, 2019 all-day seminar and takes another one with this Request For Comments.

CTA sees two major issues touching on core concerns and advocacy for an IP policy that promotes innovation:

- Fair use affords persons aided by AI a right to read and store literary works and computer software content, as well as data, for the purpose of machine learning.
- The prospect of AI access should not afford data any copyright or other protection (apart from privacy) not now afforded by law.

AI Reading Is Protected As Fair Use

To read is not to infringe. When humans read copyrighted content they do not infringe, even though the content may be momentarily fixed in neural pathways. Such retention, although a fixation, is not aimed at reproduction and has never been considered to be infringing. It is,

[1] CTA is the trade association representing the $401 billion U.S. consumer technology industry, which supports more than 18 million U.S. jobs. More than 2000 American companies – 80% are small businesses and startups; others are among the world's best-known brands – enjoy the benefits of CTA membership including policy advocacy, market research, technical education, industry promotion, standards development and the fostering of business and strategic relationships. CTA also owns and produces CES® – the world's gathering place for all who thrive on the business of consumer technologies.

rather, a "use," which is not among the enumerated rights of a copyright proprietor.[2] Similarly, when transient retention of content occurs in the process of electronic transmission with no view to further reproduction, no infringing "copy" is made.[3] Where a copy is made for research or archival purposes, and access is appropriately limited, this is also a fair use, hence is non-infringing.[4]

Whether reading for the purpose of AI learning might be infringement was one of the two major copyright issues discussed at the PTO's Jan. 31 seminar on AI.[5] There was no dispute in this day-long seminar about the importance to AI of machine reading for the purpose of learning; nor was there any dispute over whether such learning is both essential and beneficial to technical progress and to national objectives. All of the panelists, including Ms. Rasenberger, the Executive Director of The Authors Guild, which had brought and lost the *HathiTrust* and *Google Books* cases, agreed that copies made in the process of machine learning are covered by the results of those cases, hence must be considered non-infringing. Ms. Rasenberger's complaint was different: that this legal outcome reflects "20th Century thinking" because, as a matter of public policy, it is unfortunate for authors.[6]

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[2] "[T]he copyright statute accords the proprietor of a copyright a number of exclusive rights. But unlike the patentee, the copyright owner does not enjoy the exclusive right to 'use' his copyrighted work." Alan Latman, *Fair Use of Copyrighted Works*, 2 STUDIES ON COPYRIGHT 781, 783 (Copyright Soc'y of the U.S. ed., 1963).

[3] *See generally* Jessica Litman, *Lawful Personal Use,* 85 Tex. L. Rev. 1871, 1882 (2007).

[4] *See Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d. Cir. 2015); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d. Cir. 2014).

[5] *See* panel discussion at 33:00 – 55:00. https://rev-vbrick.uspto.gov/#/videos/d6e591c3-64cf-4d74-ab35-9f387a2da4b2.

[6] For support in criticizing this outcome Ms. Rasenberger cited phrases from a law review article by Prof. James Grimmelmann, *Copyright for Literate Robots*, musing on whether advances in AI machine learning should be a national *policy* objective. She could not and did not dispute Prof. Grimmelmann's conclusion, however, that the result in these cases was "impeccably correct." 101 Iowa L. Rev. at 681(2016).

The case law on non-AI reading-for-learning teaches that AI reading does not infringe where fixed copies are produced but not distributed. In *Davis v. United Artists*, the court deemed whether or not defendants had read or copied an unpublished *script* to be irrelevant to determining whether the defendant's *motion picture* infringed that script.[7] Similarly, in *Warner Bros., Inc. v. Am. Broad. Cos.*, the Second Circuit panel explained that even where there clearly had been access, intentional reference, and interim copying for the purpose of *developing a character*, the interim study and learning from a copyrighted work is not infringing if the intention and result is to produce a non-infringing work: "[A] defendant may legitimately avoid infringement by intentionally making sufficient changes in a work which would otherwise be regarded as substantially similar to [the copied work] of the plaintiff's."[8]

This general copyright rule that interim access for the purpose of *learning* does not infringe has already been applied to machine learning. In *A.V. ex rel. Vanderhye v. Iparadigms, LLC*, 562 F.3d 630 (4th Cir. 2009), schools and universities used a software program to ingest student and scholarly submissions, which were then stored and analyzed against a database of other works, *solely for the purpose of detecting plagiarism*. The Fourth Circuit panel affirmed the district court's grant of summary judgment for the defendant because such copying was for neither an expressive nor competitive purpose, and the copying (as opposed to any finding of plagiarism) had no potential effect on the value of the works analyzed.[9] This is precisely the

[7] 547 F. Supp. 722, 724 n.9 (1982): **"**Since the ultimate test of infringement must be the film as produced and broadcast, we do not consider the preliminary scripts. *See Fuld v. Nat'l Broad. Co., Inc.,* 390 F. Supp. 877, 882 n.4 (S.D.N.Y.1975)." In *Fuld* the court added, in the cited note, "The claimed similarities in the two original scripts would, of course, be relevant if access were at issue. Nimmer on Copyright, Vol. 2, p. 619."

[8] 720 F.2d 231, 241 (2d Cir. 1983). *See discussion in* Sag, Matthew, *Copyright and Copy-Reliant Technology*, 103 NU L. R. 1607, 1635 - 1636 and n.173 (2009).

[9] *See id.* 1623 - 1624.

circumstance of AI machine learning – to read content for a purpose that is orthogonal to, and does not involve, reproduction.

Thus in the PTO panel discussion Ms. Rasenberger suggested a legislative enactment, rather than a new rule for deciding cases. She proposed that, by some means, authors should be compensated for the *scope and scale* at which their works may be ingested by AI. This is not a copyright question at all. Legislation to achieve any such result would have to somehow reward authors of *any and all content that is machine readable by scanning or reproduction* – which is almost *everything*.

CTA does not agree that reading for AI learning harms authors or raises issues requiring new policies. But even if one disagrees, the idea of an "AI tax" for the benefit of all who write goes far beyond copyright or IP. The constitutional basis of copyright reward is to provide an incentive to contribute to the useful arts. A general tax on AI reading, if at all related to copyright, would need to involve determination of which texts are, for example, artistic as opposed to political. Such determinations would extend beyond our jurisprudence and far beyond this AI proceeding.

Taxing AI reading would also directly contravene national policy, as stated in the Feb. 11, 2019 *Executive Order on Maintaining American Leadership in Artificial Intelligence*:

> Maintaining American leadership in AI requires a concerted effort to promote advancements in technology and innovation, while protecting American technology, economic and national security, civil liberties, privacy, and American values and enhancing international and industry collaboration with foreign partners and allies. It is the policy of the United States Government to sustain and enhance the scientific, technological, and economic leadership position of the United States in AI R&D and deployment through a coordinated Federal Government strategy, the American AI Initiative ….[10]

[10] Executive Order Section 1, Policy and Principles https://www.whitehouse.gov/presidential-actions/executive-order-maintaining-american-leadership-artificial-intelligence/.

There Is No Basis To Afford Copyright or General Sui Generis Protection To Mere Data

It has been settled since *Feist*[11] that mere data neither deserves nor receives copyright protection. Whether to overturn *Feist* was the subject of intense debate in 1996. As the U.S. Copyright Office reported in 1997, "During 1996, the possibility of legislation providing a new form of protection for databases was raised in the respective Congressional committees dealing with intellectual property. …" After extensive discussion and meetings, no action was taken.[12] CTA is not aware of any significant reason for movement toward a general database protection provision on a *sui generis* basis.[13]

Respectfully submitted,

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[11] *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).
[12] U.S. COPYRIGHT OFFICE REPORT ON LEGAL PROTECTION FOR DATABASES August 1997, at 57 – 110, https://www.copyright.gov/reports/db4.pdf.
[13] *See* Congressional Research Service, Data Protection Law: An Overview March 25, 2019, https://fas.org/sgp/crs/misc/R45631.pdf.