copyright alliance

BEFORE
U.S. PATENT AND TRADEMARK OFFICE

Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation	**Docket No. PTO–C–2019–0038**

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the U.S. Patent and Trademark Office's (USPTO) *Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation* published in the Federal Register on October 30, 2019.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

In an attempt to respond to the questions posed in the Federal Register notice we surveyed our members to compile their input and develop a consensus response to the questions that represents the views of a broad section of the copyright community. What we discovered is that our members had differing approaches to the copyright implications of Artificial intelligence (AI), due in large part to varying degrees of knowledge about and attitudes toward AI. Despite these differing viewpoints, there is a strong consensus that AI is a profound technology that will implicate difficult questions as it relates to the Copyright Act.

As an emerging and complex field of technology, which may involve both the ingestion and output of works of expression, AI is already impacting business and our daily lives, and prompting some difficult questions. We must therefore begin to consider whether existing laws are sufficient to accomplish the underlying goals and purposes of the Copyright Act. While it may be too soon, and potentially irresponsible, to attempt to *definitively* answer these questions at this time, it is a good time to begin delving deeper into these issues by engaging stakeholders and policymakers and to start an ongoing dialogue that begins the process for finding these answers. As a tool for information gathering, and productive discourse and debate, these discussions would allow policymakers and interested parties to become more knowledgeable about AI and its relationship to copyright law so that they are in a good position to proactively address these issues when the time is ripe, without acting prematurely in a manner that could cause more harm than good.

For this process to work the participants need to agree on some general tenets for the discussions. The first of these is respect for all intellectual property, especially copyright. Whenever a new technology comes along there are some that view it as opportunity to weaken copyright. For example, when the internet was at its very nascent stages, individuals suggested that copyright should not apply online. We still hear the mantra today that "information wants to be free." Any such view should not be tolerated and play no role in these discussions. It's important that all policymakers and stakeholders come to the table with a common understanding about the value and importance of copyright and that this effort not be used for the primary purpose of weakening existing areas of copyright.

The second tenet is education. AI is relatively new so we are just beginning to grasp the current relationship between copyright and AI and what it may be in the future. The term "AI" encompasses many technologies and use cases, so when we talk about AI it is not only important to have a common understanding of what AI is, but also to be specific about the particular applications of AI that are the source of concerns. Creating workable rules will require serious, thoughtful study of all potential ramifications and a good understanding of what AI is now and where it is going.

Because of the disparate knowledge about AI within the copyright community, there is a real need to educate stakeholders and policymakers about AI and its relationship to copyright. It's difficult to develop the rules of the road when there's not a shared understanding of how to read the map. An example of this can be found in the NOI itself. The NOI does not provide a common definition of AI that can be used by respondents to answer the questions, nor does it ask the respondents to provide their own definition.

AI is a broad and evolving field of technology, which can be categorized into generative or discriminative models, and can encompass and overlap with fields like text and data mining, and machine learning. Without a common understanding or an agreed-to definition of AI, it will be difficult for those government officials tasked with evaluating the responses to determine where there may be agreement, or disagreement, between the respondents. For example, some respondents may be answering the questions with differing views and definitions regarding the scope of AI in the context of these questions. That could lead to unintended misunderstandings. The first step in understanding these key AI issues is to better understand AI itself.

The third tenet is the recognition that it's important not to talk in generalities when we discuss AI and copyright. The answers to many of the questions posed in the Federal Register Notice must be evaluated on their own facts and on a case-by-case basis, but the questions do not lend themselves well to the fact-specific responses necessitated by AI. Given that the term "AI" encompasses many technologies and use cases, we need to be specific about the particular applications of AI that are the source of concern and to be specific about the copyright-related issues.

Determining how intellectual property rules apply to a new technology is not a new challenge. These issues should be a part of an ongoing discussion amongst a broad group of copyright owners and experts in the field of AI. The group's primary purpose would be to develop a better understanding of AI and the relationship between copyright and AI. The current state of AI technology warrants a comprehensive understanding and analysis before moving on to each of the questions posed. Guest speakers could be brought in to speak about the current and future roles of AI. Academic and other papers can be distributed to the group (with permission of course). Once a baseline of AI and copyright knowledge is achieved, if the group members agree, the group could move on to the second question: whether current law is sufficient to address the copyright-related issues raised by AI, and possibly consider making recommendations for appropriate changes to U.S. copyright and other law and policy where the current law is insufficient. Since AI will continue to evolve, it will be important to monitor AI and its relationship to intellectual property and to revisit these, and other, questions about the relationship between AI and copyright over time.

Below, subject to the constraints we noted above, we attempt to answer the specific questions posed in the NOI, in order of importance to the Copyright Alliance and its members:

Question 3:
To the extent an AI algorithm or process learns its function(s) by ingesting large volumes of copyrighted material, does the existing statutory language (e.g., the fair use doctrine) and related case law adequately address the legality of making such use? Should authors be recognized for this type of use of their works? If so, how?

As noted above, policymakers should make clear that copyright must be respected in the context of AI. Some of the best training data often happens to be valuable copyrighted works. Where a particular function or output of AI implicates one or more of the exclusive rights under section 106, copyright law should continue to protect those rights. Copyright law should allow owners to exploit markets for licensing for AI uses, if they so choose. Where a copyright owner offers licenses for uses relating to the ingestion and/or training of AI system, it is essential that these licenses be respected by any copyright or AI legal regime.

As with other considerations in copyright law, evaluating whether a particular AI algorithm, function or output is infringing will be a fact-specific inquiry that should be decided on a case-by-case basis. Currently, this is too complex an area for bright line rules. It is therefore essential that we differentiate between types of copying for AI functional uses. This is especially the case where AI systems generate creative content that competes directly with the copyrighted works on

which they were trained. There are some who believe that use of copyrighted works for AI ingestion should automatically be considered to be a transformative use. We strongly disagree with this view. There may be instances where it is transformative but it will often not be the case.

Should a work produced by an AI algorithm or process, without the involvement of a natural person contributing expression to the resulting work, qualify as a work of authorship protectable under U.S. copyright law? Why or why not? Assuming involvement by a natural person is or should be required, what kind of involvement would or should be sufficient so that the work qualifies for copyright protection?

There are examples of AI working without human involvement closely associated, but they are few and often not well known amongst the copyright community. This is an area where education can be very helpful.

It is our present view that AI should be thought of as a tool that aids humans in creating works. The involvement of a natural person should be presupposed, and the inquiry should be whether the work qualifies as copyrightable expression, in accordance with title 17. How to identify the particular natural person or persons may vary depending on the context, and in many cases will be resolved by contracts.

Are current laws for assigning liability for copyright infringement adequate to address a situation in which an AI process creates a work that infringes a copyrighted work?

The ability to hold a natural or legal person responsible when AI infringes is an issue that will eventually need to be proactively addressed. Our initial view is that liability should attach to the beneficiary of the output of the AI—i.e., the person or entity whose authorship or ownership affords them the benefits of the Copyright Act should also be responsible should that work infringe the rights of another under the Act.

Any copyright infringement analysis would require a determination of whether "actual copying" was involved. This could be very difficult unless there is a record of the training data that was used.

In the context of an infringement case, when evaluating whether "actual copying" has occurred in the creation of an output, courts should consider not only at whether the AI ingested a particular work *at the direction of* a natural person, but also whether the AI was *enabled by* a natural person to ingest the work on its own.

Should an entity or entities other than a natural person, or company to which a natural person assigns a copyrighted work, be able to own the copyright on the AI work? For example: Should a company who trains the artificial intelligence process that creates the work be able to be an owner?

Where there are questions as to ownership of an output, licenses and other agreements will usually be determinative. At this stage, although the factual analysis may be different, we do not think AI presents legal issues relating to ownership or transfer that are any different than those that exist today outside the area of AI.

Question 13:
Are there any relevant policies or practices from intellectual property agencies or legal systems in other countries that may help inform USPTO's policies and practices regarding intellectual property rights (other than those related to patent rights)?

The United States is not the only country to consider the complex issues involving AI and copyright. In particular, the EU has been active in this area. The EU Member States joined forces with the European Commission in December 2018 to develop a Coordinated Plan on AI and in January 2019, to develop a report on European industrial policy on artificial intelligence and robotics. Japan has revised its copyright laws to address AI. Much can be learned by policymakers and stakeholders in the United States from the analysis and decisions made by these policymakers in these other countries.

Respectfully submitted,

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