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General Comment

See attached file(s)

Attachments

USTPO-RFC-for-the-impact-of-AI-on-Intellectual-Property-rights

1. 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?

No.

Article 2 para. 6 of the Berne Convention clearly focuses on the natural person as the author of works. Even in the few special cases where legal persons are allowed to claim authorship, the actual creation of the work has to be facilitated by natural persons. Historically this is a sound interpretation, considering the convention is based on the continental European author's rights tradition. In addition, even jurisdiction in common law based countries like the USA (see Naruto, et al. v. Slater, et al., no. 16-15469 (9th Cir. April 23, 2018) as an example) seems to be consistent with this interpretation.

We think extending the current interpretation of what constitutes a work or an author would do more harm than good. A lot of jurisdiction would probably be rendered baseless, causing great amounts of legal uncertainty around the world, while there are no additional incentives to foster the creation of art.

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2. 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? For example, should it be sufficient if a person (i) designed the AI algorithm or process that created the work; (ii) contributed to the design of the algorithm or process; (iii) chose data used by the algorithm for training or otherwise; (iv) caused the AI algorithm or process to be used to yield the work; or (v) engaged in some specific combination of the foregoing Start Printed Page 58142activities? Are there other contributions a person could make in a potentially copyrightable AI-generated work in order to be considered an "author"?

(I) **No.** The same way the producer of a paint brush is not author of the works created by it. If this would be the case, computer compiler vendors or vendors of AI based security scanners (which in some cases automatically fix errors in code) would be co-authors of computer applications processed by it, vendors of photo- or video-editing solutions would be co-authors of the corresponding works and even camera vendors may be able to participate as co-authors in the creation of new works. That said, the implementation of the algorithm itself is almost certainly to be considered a work under copyright protection, which offers all the incentive that is required to further this area of technology.

(ii) **No.** See reasoning for (i).

(iii) **No.** This would be analogous to selecting the scene to be painted by an artist.

(iv) **No.** This would be analogous to blindly hitting the shutter button of a camera without knowing where it is pointed at. While not completely clear from the interpretation of the Berne Convention alone, international legislation and jurisdiction seem to agree that a work must constitute an author's own intellectual creation, which is clearly not given in this case.

(v) **No.** An analogous example of combining all of the above would be an artist who hangs a paint bucket (*(iii) choosing the data used by the algorithm*) on a rope from the ceiling of a room

above a canvas - where the rope can be cut from outside the room to spill the paint from the bucket on the canvas (*(i, ii) designing the algorithm*) - then leaves the room, shuts the door, and cuts the rope, so that the bucket can hit the floor and spill the paint on the canvas (*(iv) causing the algorithm to process*). As the actual result on the canvas is clearly random, it does not constitute the author's own intellectual creation. Note that while the mechanism itself may be original, mechanisms are not protected by copyright.

In our point of view, an AI algorithm is just another tool that can be used to create works. While a brush can be used to create an artwork, it may also be used to paint a wall or grease the tart mould. The same is undoubtably true for AI algorithms. Just because 'artificial intelligence' carries a fancy name, it does not mean that it is - nor that it should be - a magic bullet to achieve copyright protection.

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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?

We think the fair use doctrine is well equipped to address the legality of making such use. In fact, the EU just agreed on mandatory exceptions regarding the use of copyrighted material for datamining (Articles 3 and 4 of the new Copyright Directive (790/2019)), with the strong suggestion for the member states to implement these exceptions without remuneration, because these exceptions will not cause any harm to the right holders (Recital 17 of the same directive). This shows that such use is clearly within the scope of the fair use doctrine, and that remuneration for such use is neither required nor advisable as no harm is caused to the right holders.

However, it should be made abundantly clear, that technical measures - including the ones introduced by the WCT and put into legislation by the DMCA - must not be used to prevent or hinder data mining of content that is legally accessible.

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4. 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?

Yes.

The same way digital photography did not change the way copyright infringements of photographs are addressed, AI algorithms do not change the way copyright infringements that are caused by the use of algorithms in general are addressed.

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5. 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?

No.

As already stated on question 2., the fact that the tool AI was involved in the creation of a copyrighted work should not have any special implications on the legal status of the result. While AI is a tool with a fancy name, it is still just a tool. Replace 'AI' with 'brush' and you will see the picture much clearer (no pun intended).

Allowing to broaden the definition of what constitutes an author (or rights holder) of works may also have unintended but far reaching consequences on existing jurisdiction around the world.

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9. How, if at all, does AI impact the need to protect databases and data sets? Are existing laws adequate to protect such data?

Yes, existing laws are adequate to protect such data.

All rules for copyright and neighboring rights apply equally to results from AI. An infringment is still an infringement if AI was involved.