

AI Insights

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US Copyright Office Undertakes Study of Copyright Law and Policy Issues Raised by AI

On August 30, 2023, the U.S. Copyright Office published a notice of inquiry and request for comment (Notice) in connection with its ongoing study of the copyright law and policy issues raised by artificial intelligence (AI). As discussed below, the Copyright Office is exploring a wide range of issues, including whether changes are required to certain fundamental copyright principles to adapt to AI. Comments are due to the Copyright Office by October 18, 2023.

Public Comment

The stated purpose of the Notice is to collect “factual information and views relevant to . . . copyright law and policy issues raised by recent advances in generative AI.” The Notice states that the Copyright Office intends to use the information to advise Congress on the current state of the law, to identify unresolved issues in the space and to evaluate potential areas for congressional action. The Copyright Office also notes that it may use the collected information to inform its regulatory work and provide resources to the public. Although the Notice mentions both generative and nongenerative AI uses, the Copyright Office appears to be particularly interested in issues related to generative AI.

The Copyright Office seeks comment on a number of issues, with a focus on the following four areas:

1. The use of copyrighted works to train AI models.

- The Copyright Office acknowledged the “disagreement” about whether and when the use of copyrighted works to develop datasets for training AI models (in both generative and nongenerative systems) constitutes infringement. To address this uncertainty, the office is seeking information about the collection and curation of these AI datasets, how datasets are used to train AI models, the sources of materials ingested into training AI models, whether such materials are retained, and whether to require permission by and/or compensation for copyright owners when their works are included in AI training sets. Regarding the latter point, the office seems particularly focused on the practicalities of a permission or compensation system, including whether an “opt out” approach might work and whether a compulsory licensing scheme — as exists in certain other areas of copyright law — is feasible.
- Regarding the question of fair use, the Copyright Office notes the Supreme Court’s recent decisions in *Google v. Oracle America* and *Andy Warhol Foundation v. Goldsmith* and asks how the “purpose and character” of the use” prong of the fair use test should be applied when evaluating the use of copyrighted works in training

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data, and whether different stages of training (*e.g.*, pretraining and fine-tuning) raise different considerations. Similarly, the office seeks input on how to measure the fourth factor of the fair use test (the effect on the potential market for the copyrighted work) in the context of training AI models. For example, should the market impact of the AI-generated output be analyzed with respect to a particular work or a general class of works?

- The Copyright Office is also seeking comments on the retention of records detailing which underlying training material was used to develop AI models, and whether to make this information available to copyright holders.

2. The copyrightability of material generated using AI systems.

- The Copyright Office is seeking input on the “proper scope of copyright protection” for materials created using generative AI, including how much human input should be required for an AI-generated work to be considered “human-authored.” For example, the office is assessing whether the selection of training material and the use of multiple iterations of prompts should satisfy the human-authorship requirement.
- The office is also seeking input on whether AI-generated material should be labeled or identified as being generated by AI.

3. Potential liability for infringing works generated using AI systems.

- Specifically, the Copyright Office noted its interest in how “copyright liability principles” could apply to material created by generative AI, including, in particular, whether AI-generated outputs implicate the right of reproduction and the derivative work right, and how to apportion liability between the user who provided the instructions to generate the output and the developers of the AI system and dataset.
- The office is also seeking comments on whether the “substantial similarity” test is adequate to address claims of infringement related to AI-generated works, or if another standard is more appropriate.

4. The treatment of generative AI outputs that imitate the identity or style of human artists.

- While the Copyright Office acknowledged these attributes are generally not protected by copyright law, it noted it is nonetheless seeking comment on the matter given the potential

implications on rights of publicity and unfair competition law, as well as international treaty obligations, including whether Congress should establish a new federal right.

The Notice includes over 30 questions targeted at addressing these four key areas, as well as other related topics. The questions are generally categorized into inquiries on AI model training, including with respect to transparency and accountability; AI outputs, including with respect to copyrightability, infringement and labeling or identification of such outputs; and the current and future legal landscape governing AI. While the Copyright Office noted that commentators do not need to respond to every question, they are required to provide the factual, legal or policy basis for their responses to the questions they choose to address.

Acknowledging the importance of using shared language when discussing issues related to AI, the Copyright Office provided a glossary of key terms only for the purposes of the Notice. While no questions specifically address the provided definitions, the office stated that it welcomes input from commentators on the definitions contained in the glossary.

Comments to the Copyright Office are due no later than 11:59 p.m. Eastern time on Wednesday, October 18, 2023. Any written reply comments are due no later than 11:59 p.m. Eastern time on Wednesday, November 15, 2023.

Takeaways

While some practitioners have posited that the Copyright Office had already decided how to treat AI-generated works, the Notice shows that the office is still open to considering public input on a wide range of AI-related issues.

The Notice is the latest action taken by the Copyright Office in recent months to address the unique copyright issues presented by AI. The Notice follows the Copyright Office’s recent decisions to reject two attempts to register copyrights in AI-generated works: (i) its refusal to register “A Recent Entrance to Paradise”¹ — on the grounds that an application for an image autonomously generated by AI was not protectable; and (ii) its issuance of a new registration for “Zarya of the Dawn” — on the grounds that only the human contributions to a graphic novel that included AI-generated images were protectable, not the AI-generated content itself.

¹ See our August 28, 2023, client alert “[District Court Affirms Human Authorship Requirement for the Copyrightability of Autonomously Generated AI Works.](#)”

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The Notice is also part of the Copyright Office's AI initiative, which to date has included: (i) its March 2023 registration guidance on the copyrightability of works that incorporate AI-generated material, which emphasized the human-authorship requirement for copyrightability;² (ii) public listening sessions, which covered copyright issues raised by generative AI for literary works, works of visual art, audiovisual works and musical works and sound recordings; (iii) educational webinars, including

² See our March 16, 2023, client alert "[Copyright Office Issues Guidance on AI-Generated Works, Stressing Human Authorship Requirement.](#)"

a presentation clarifying the process for applying to register works containing AI-generated material;³ and (iv) the Copyright Office's reported conversations with key stakeholders.

If you would like additional information about the topics being considered by the Copyright Office or to discuss crafting a comment in response to the Notice, please reach out to your Skadden contact.

³ See our August 2, 2023, client alert "[Copyright Office Provides Guidance on the Registration of Works That Include AI-Generated Material.](#)"