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July 12, 2023

Chair Chris Coons
U.S. Senate Committee on the Judiciary
Subcommittee on Intellectual Property
Washington, DC 20510

Ranking Member Thom Tillis
U.S. Senate Committee on the Judiciary
Subcommittee on Intellectual Property
Washington, DC 20510

Re: July 12, 2023 Senate Judiciary Subcommittee on Intellectual Property Hearing: Artificial Intelligence and Intellectual Property – Part II: Copyright

Dear Chair Coons and Ranking Member Tillis:

On behalf of the Computer & Communications Industry Association ("CCIA"),[1] we write to explain how existing copyright law already covers emerging technology like artificial intelligence ("AI"). CCIA requests that this statement be included in the record of the hearing scheduled for July 12, 2023.

CCIA's members are leaders in AI innovation. Most modern AI technology utilizes hardware manufactured by CCIA member companies, and much of it relies on AI technology released as open-source contributions by CCIA members. Because of this, CCIA members have a significant interest in ensuring that the various types of AI-related inventions are promoted, rather than suppressed, by the U.S. copyright system. CCIA believes that existing law is generally capable of addressing issues related to artificial intelligence and serves to promote creative activity in AI technology. While unique issues might arise in the future that require additional legislation or regulation, the technology-neutral nature of the present Copyright Act is sufficient to address present issues regarding AI and copyright.

I. Authorship

One primary issue, AI authorship, has already been addressed by the Copyright Office. As properly interpreted by the Copyright Office, a work produced by an AI algorithm or process, without the involvement of a natural person contributing to the resulting work does not qualify as a work of authorship protectable under U.S. copyright law. This interpretation follows in a long line of cases and guidance finding that only a natural person can create a work of authorship protectable via copyright.

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[1] CCIA is an international, not-for-profit trade association representing a broad cross-section of technology and communications firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

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The Copyright Office currently refuses to register a work that was not created by a human being. It explains that the copyright law only protects "the fruits of intellectual labor" that "are founded in the creative powers of the mind." *Trade-Mark Cases*, 100 U.S. 82, 94 (1879). Because copyright law is limited to "original intellectual conceptions of the author," the Office will refuse to register a claim if it determines that a human being did not create the work. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). The Copyright Office adds that it "will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author." There is no need for this provision to change. Artists who incorporate technology into their artistic process can still copyright the overall artistic product, so long as the human artist has contributed a sufficient amount of original material to the combined work.

II.   Training

Existing law also adequately addresses the issue of the use of copyrighted material for training AI models. The existing statutory framework and related case law concerning the fair use right, 17 U.S.C. § 107, clearly permit the ingestion of large amounts of copyrightable material for the purpose of an AI algorithm or process learning its function.

The flexible and balanced copyright law regime in the U.S. has been key to American success in innovation in emerging technologies like AI. The U.S. leads the way in AI development in large part due to the fair use right. AI algorithms and other processes often require the ingestion of large amounts of material. Assembling that material may entail converting it into a more usable format, e.g., translating image files into mathematical image representations. In addition, backup copies of the materials may be necessary to protect against loss of data in the event of system failure. Temporary reproductions of portions of the material in a computer's random access memory are a normal part of any computer program, including the process of training an AI algorithm. These copies are not viewable or consumable by the outside world. These non-expressive copies are not consumable by the public. They do not function as market substitutes for copies of the ingested works.

Numerous appellate courts have correctly found the mass copying of raw material to build datasets for automated computational analysis to be fair use under 17 U.S.C. § 107. *See, e.g.*, *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009); *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).[2] Training AI is a form of this computational analysis.

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[2] *See also* Jonathan Band, *Israel Ministry of Justice Issues Opinion Supporting the Use of Copyrighted Works for Machine Learning*, Disruptive Competition Project (Jan. 19, 2023), https://www.project-disco.org/intellectual-property/011823-israel-ministry-of-justice-issues-opinion-supporting-the-use-of-copyrighted-works-for-machine-learning/.

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Judge Leval's opinion in *Google* provides the clearest analysis of why the creation of datasets for computational analysis, and their subsequent uses, are fair uses.

While this activity is already fair use, if more clarification is needed in the future, Congress could consider enacting a specific provision permitting the creation and use of datasets for computational analysis. Such an unambiguous provision could provide useful guidance to AI developers and courts.

III.   Infringement

Finally, existing copyright law adequately protects against infringement. If the output of an AI system resembles existing copyrighted material, then the ordinary analysis of whether copyright infringement has occurred would apply. In short, the question would be whether the AI system had access to the allegedly infringed work, and whether the AI system's output is substantially similar to the allegedly infringed work. The first question is trivial to answer by examining whether the work in question was part of the training data used by the AI system. If it was not used in training, the AI system did not have access to it. The second question is answered as it would be in any other copyright case.

The sole remaining question in output infringement is who would be held liable for the infringement. Here, as in other areas of law, principles of agency and causation will guide the courts. Generally, however, liability should lie on the end-user who requests and publishes a copyright-infringing work. Much like many other areas of technology, including photography, AI systems are strong examples of a "staple article or commodity of commerce suitable for substantial noninfringing use." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 440-42 (1984). Misuse of AI systems to infringe copyright, much like misuse of a VCR or computer to impermissibly replicate copyrighted content, is attributable to the user, not the manufacturer of the system being abused.

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CCIA hopes this letter helps illuminate the flexible nature of current copyright law and how it stands ready to handle the new issues raised by the creation of generative AI. We would be pleased to provide further information to your offices and those of other members of the Subcommittee on any topic which might aid you in your work.

Sincerely,

Ali Sternburg
    Vice President, Information Policy, CCIA
Joshua Landau
    Senior Counsel, Innovation Policy, CCIA