

FTC Advises Copyright Office on AI — AI: The Washington Report

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Welcome to this week's issue of AI: The Washington Report, a joint undertaking of Mintz and its government affairs affiliate, ML Strategies.

The accelerating advances in artificial intelligence (“AI”) and the practical, legal, and policy issues AI creates have exponentially increased the federal government’s interest in AI and its implications. In these weekly reports, we hope to keep our clients and friends abreast of that Washington-focused set of potential legislative, executive, and regulatory activities.

This issue covers the Copyright Office’s [request for comments](#) (“RFC”) on issues regarding AI and copyright, and the Federal Trade Commission’s (“FTC”) [submission to this RFC](#).

1. The [RFC](#) seeks to gather public input to guide the development of copyright law to account for advances in AI technology. Some questions of interest to the Copyright Office include the use of copyrighted works to train AI models and the copyrightability of material generated using AI systems. Comments are [due on December 6, 2023](#).
2. On October 30, 2023, the FTC [submitted a comment](#) to the Copyright Office’s RFC. In this comment, the FTC expressed its interest in AI

issues more generally as well as the question of how advances in AI should impact the development of copyright law. Significantly, the FTC suggested that actions could be consistent with copyright law but still violate Section 5 of the Federal Trade Commission Act.

3. A summary of the FTC's October 2023 panel on "[Creative Economy and Generative AI](#)" included in its comment may provide insight into the positions held by some in the Commission regarding AI-era adjustments needed to modernize copyright law.

Copyright Office Requests Public Input on AI Issues

In August 2023, the US Copyright Office posted a [notice of inquiry and request for comments](#) ("RFC") pursuant to a "study of the copyright law and policy issues" raised by AI. As discussed in a [previous newsletter](#), this RFC is part of a broader Copyright Office effort to respond to novel questions posed by the development of AI, especially generative AI systems. Comments to the RFC are [due on December 6, 2023](#).

To guide the development of copyright policy in the age of AI, the Copyright Office is soliciting comment on a range of AI-related issues, including the following.

1. The use of copyrighted works to train AI models. Should copyright owners have to affirmatively consent to the use of their works as AI training materials (an opt-in model), or should they be able to object to such use of their works (an opt-out model)? Also of interest to the Copyright Office is "what kind of remuneration system(s) might be feasible and effective" to compensate creators whose works are used to train AI models.
2. The copyrightability of material generated using AI systems. While the Copyright Office has remained steadfast in its assertion that "copyright protection in the United States is limited to works of human authorship, questions remain about where and how to draw the line between human creation and AI-generated content."
3. Potential liability for infringing works generated using AI systems. Should an AI output be "substantially similar to a copyrighted work that was part of the training dataset, and the use does not qualify as fair," how should liability be apportioned?

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4. Treatment of generative AI outputs that imitate the style of human creators. While the creative attributes mimicked by a generative AI system would not be protected by copyright law, this copying may implicate state right of publicity laws, unfair competition law, or international treaty obligations.

Along with these issues, the notice of inquiry asks respondents to inform the Copyright Office of regulatory approaches related to AI and copyright adopted or under consideration in other jurisdictions that should be considered or avoided in the United States.

FTC Comment to the Copyright Office RFC: Doubling Down on AI Regulation

On October 30, 2023, the Federal Trade Commission (“FTC”) [submitted a comment](#) to the Copyright Office’s RFC. In this RFC, the FTC explains its interest in AI regulation more broadly and in issues regarding AI and copyright.

The Commission’s Interest in General AI Issues

In its comment, the Commission explains that the accelerating development of AI systems “raises concerns about potential harm to consumers, workers, and small businesses.” To respond to these concerns, “the FTC has been using its existing legal authorities to take action against illegal practices involving AI.”

Along with the consumer protection harms, the FTC is concerned that the “rapid development and deployment of AI also poses potential risks to competition.” Echoing [prior FTC pronouncements on AI and competition](#), the comment reasons that incumbent technology firms possess the data and computing resources to gain lasting dominance in the AI space. With their leading status secured, these firms could, reasons the FTC, “unlawfully entrench their market positions in AI and related markets” through anti-competitive conduct.

To prevent this scenario, the current FTC is prepared to utilize “Section 5 of the FTC Act to protect the public against unfair methods of competition, including when powerful firms unfairly use AI technologies in a manner that

tends to harm competitive conditions.”

“As we encounter new mechanisms of violating the law,” warns the Commission, “we will not hesitate to use the tools we have to protect the public.”

Hints of the FTC’s Perspective on Copyright and AI

Primarily, the FTC has expressed interest in the Copyright Office’s inquiry into issues relating to copyright and AI because the deployment of “AI technology raises significant competition and consumer protection issues beyond questions about the scope of rights and the extent of liability under the copyright laws.”

For instance, the development of the fair use doctrine to keep pace with developments in the field of AI “could influence the competitive dynamics of the markets for AI tools and for products with which the outputs of those tools may compete.”

Uses of AI that violate established copyright law, such as the mimicry of an artist’s creative style, may violate the prohibition on unfair or deceptive acts or practices established by Section 5 of the FTC Act. The Commission is careful to note that “conduct that may be consistent with the copyright laws nevertheless may violate Section 5.”

To demonstrate its interest in issues surrounding AI and copyright, the FTC conveyed to the Copyright Office salient points from its October 2023 roundtable discussion on “Creative Economy and Generative AI,” covered in a [previous newsletter](#). The roundtable featured creatives from a range of industries and saw Chair Lina Khan assert that “there’s no AI exemption to the laws on the books.”

In its summary of the October roundtable, the FTC’s comments to the Copyright Office may provide insight into the position held by some in the Commission regarding the way in which copyright law should evolve to account for advancements in AI technology.

The summary of the roundtable expresses the panelists’ disapproval of AI

systems' use of creative output. The FTC comment warns that “fear about having creative work scraped and used in unauthorized and potentially repugnant or displacing ways could disincentive creators from sharing their work online.”

Furthermore, the comment portrays the panelists as preferring an opt-in rather than an opt-out framework for allowing AI models to use creators' output as training data. According to the comment, the assembled panelists “said that an opt-out default puts the burden on creators to police an ever-changing marketplace” and “expressed a desire for opt-in frameworks, where AI developers seek authorial consent and clearly explain how they intend to use their work, ideally with appropriate credit and compensation.”

Along with examining AI's use of copyrighted content, the summary also discusses transparency issues. The uncanny ability of generative AI tools to replicate the creative style of an individual “can not only create consumer confusion,” argues the comment, “but it also can cause serious harm to both fans and artists.” Certain creatives participating in the roundtable “asked for mandatory disclosure of the content of training data sets” and the establishment of “clear and specific disclosures about the intended uses of their work.”

While the FTC's comment primarily focused on the risks posed by advancements in AI technology, the statement acknowledged the positive role that generative AI could play in facilitating the work of creatives. The summary of the October roundtable notes that certain participants expressed the position that “AI could potentially further opportunities for artists, including by creating access to employment for people with disabilities and those who would otherwise be prevented from pursuing work in the entertainment industry.”

Conclusion

As discussed in [previous newsletters](#), question of how copyright law should be adjusted to correspond to advances in AI technology is front of mind for federal lawmakers and regulators. [Multiple bills](#) have been introduced on the subject, and reforms ranging from the establishment of a [federal right of](#)

publicity to enforcement of transparency requirements covering the data being used to train AI models have been proposed. Separate and apart from the Copyright Office's pending proceeding, Biden's October 30 executive order on AI directs the Copyright Office to issue a report on "potential executive actions relating to copyright and AI." The record being created in this proceeding could form the basis for the report required by the executive order.

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