

### **Should Generative AI Outputs Be Protected by Copyright Law?**

Large Language Models such as ChatGPT and other generative AI have opened up more creative opportunities as much copyright concerns. The question that begs for answer is should outputs – poems, graphics design, sound recording, etc., enjoy copyright protection. As we know it, extant copyright laws only protect works from human authors that meets the originality and fixation requirements, thereby leaving out creative outputs generated with GenAI.

But the problem is that we are failing to distinguish derivative works from transformative works. Just like human authors who derive inspiration from other copyrighted works, AI models can derive inspiration from the copyright data used in their training. But there is a thin line between derivative works and transformative works. If a work is "*substantially similar*" (that is, if it does not contain new analysis or convey a new message) to an original work then that's a derivative. Under copyright laws, making derivatives is an exclusive right of the original copyright owner, however, such right can be licensed upon request and fulfilment of license terms by the licensee.

But if a new work, even though derived, is different from the original work in a way that it forms a different story, that is *transformative*. A precedent that favors this position is that of *Google Books* case, where Judge Denny Chin found that Google did not merely copy online books; it made use of them to create a new and valuable product, known as Google Books. In other words, if the material from the original work has been transformed by adding new expression or meaning, and if value has been added by such new information, aesthetics, or any other fresh perspective, then it qualifies as a transformative work, and therefore, deserving of its own copyright protection. The argument, however, has been that these transformative works may compete with the original works, thereby undermining the latter's relevance and market value. But a truly transformative work does not express the same meaning as the original work.

The purpose of generative AI models is not to replicate information, but to learn from data and create something new as seen in the *Thomson Reuters Enterprise Centre GmbH v. Ross Intelligence Inc.*<sup>2</sup> case where the AI's use of legal texts was deemed transformative. Generative AI models can create transformative work by adding substantially new information and new meaning to an original work. For example, a text generation model learns from underlying patterns, information, and then synthesize this learning to create something new.

In an attempt to respond to the question of protection of AI outputs, the US copyright commission released a policy statement on registering AI-Generated outputs<sup>3</sup> that allowed registration of AI outputs to the extent that *significant* human involvement was exercised in the creative process.

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<sup>2</sup> No. 1:20-cv-613-SB, (2023) U.S. District Court for the District of Delaware

<sup>3</sup> <https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright-registration-guidance-works-containing-material-generated-by-artificial-intelligence>

Such human involvement must have been substantive and overwhelming to satisfy the human authorship requirement of copyright laws. This policy refuse to recognize the nature of AI in developing transformative works, it upholds strictly the human authorship requirement without recognition of the changing technological advances.

Transformative works created by AI should enjoy copyright protection, provided the author (human prompter) can show a *creative* involvement in the process. Firstly, copyright commissions must work closely with AI regulatory agencies to utilize their technical expertise in verifying that an AI model can develop truly transformative works. In addition to this verification, the copyright commission should require a *creative*, rather than a substantive contribution from human authors. Upon satisfaction that a human author (prompter) had expended creativity either in the prompting or post-prompting phase, the resulting AI transformative work should be registered.

The only challenge with this is if the prompter specifically and intentionally instructs the model to generate an existing copyrighted material. But this can be avoided if the AI companies train the models to reject such instructions.