Responses by Register of Copyrights Shira Perlmutter
To Questions for the Record
Asked by Chairman Darrell Issa
After the September 27, 2023 Oversight Hearing of the U.S. Copyright Office

1. **I recently penned a letter along with my colleagues questioning the ability of the Federal Communications Commission to grant a compulsory license in the video streaming marketplace. Would you agree that authority does not reside with the FCC?**

As referenced in your question, and in your September 21, 2023 letter to Jessica Rosenworcel, Chairwoman of the Federal Communications Commission ("FCC"), the Office is aware through public sources that the FCC has been requested to address the definition of multichannel video programming distributor (MVPD) set forth in the Communications Act at 47 USC § 522, specifically to expand it to include virtual MVPDs (vMVPDs) that retransmit broadcast programming to subscribers over the internet. We understand that the FCC's open rulemaking in *Promoting Innovation and Competition in the Provision of Multichannel Video Programing Distributions Services,* MB Docket No. 14-261, may address this issue.

The long-standing view of the Copyright Office is that internet retransmissions of broadcast television do not qualify for the statutory license in Section 111 of the Copyright Act. This license is only available to entities that satisfy Section 111's definition of "cable systems," as well as other statutory requirements. Section 111 does not reference the Communications Act's definition of MVPDs. Modification of the MVPD definition by the FCC would not modify the Copyright Act's definition of cable systems.

Section 111 defines cable systems as follows:

> A "cable system" is a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the FCC, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.

17 USC § 111(f)(3). The Copyright Office has previously taken the position that internet retransmissions of broadcast television do not fall within this definition because they are not retransmissions made by "wires, cables, microwave, or other communications channels," the only means of retransmission available to qualifying cable systems. *See, e.g., Copyrighted Broadcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 106th Cong. 25-26 (2000) (statement of Marybeth Peters, Register of Copyrights). Nothing in the section 111 definition of cable system – which identifies specific means of retransmission – was intended to or would be modified by the FCC's interpretation of permissible retransmission services.

A federal appeals court, when considering the question of whether an entity providing secondary transmissions over the internet could take advantage of the Section 111 compulsory license, concluded that the definition of "cable system" did not reach such retransmissions. While the court found that the definition of cable system is ambiguous on its face, it accepted the Office's reasoning and conclusion that internet retransmissions did not fit within the definition. *Fox Television Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002, 1009 (9th Cir. 2017). In support, the court noted that Congress was aware of the Office's long-held views on this matter and had repeatedly amended the statute, including the definition of a cable system to include the term "microwave," without otherwise altering it to cover internet-based services. *Id.* at 1011-12, 1014-15. Since the court's decision, the Copyright Act has not been changed in any way that would change its conclusion.

2. **The Copyright Office in its guidance of May 16, 2023, indicated that it will only register copyrights of works created by a human being, meaning that the outputs of artificial intelligence systems are not copyrightable, while at the same time recognizing the copyrightability of photographs, including digital photography that uses AI (e.g., "Portrait Mode" on an iPhone). The Supreme Court has recognized that a photographer's arranging, selecting, and determining the scene for the photograph gives rise to an original work of authorship under copyright law, even though a machine (i.e., a camera) ultimately generated the photograph. How is artificial intelligence different, when the user of the artificial intelligence system may input a detailed prompt or series of prompts that can be paragraphs long?**

The Copyright Office is continuing to consider the extent to which legal principles regarding copyright protection for photographs may apply to the analysis of material generated by artificial intelligence (AI).

As alluded to in your question, the Supreme Court long ago addressed the copyrightability of photographs in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), a case involving a photograph of Oscar Wilde. In that case, the Court reasoned that the camera was used as a tool to capture creative choices made by the photographer, such as the choice of lighting and arrangement of the subject and scene. As photographic technology has evolved, courts have continued to hold that copyright protects the creative choices of the photographer, which may be distinct from the subject of the photograph. *See, e.g., Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1119 (9th Cir. 2018) (photographer could not claim copyright in Michael Jordan's pose itself but could in the "pose [that] is expressed in his photograph, a product of not just the pose but also the camera angle, timing, and shutter speed [the photographer] chose").

The Copyright Office's position on works created in whole or in part by generative AI relies on similar principles. Our registration decisions are made on a case-by-case basis, grounded in existing case law, including court decisions on human authorship. Whether a particular output of an AI system is protected by copyright will depend on how that system operates and whether human users have a sufficient degree of control of the expressive elements. As our registration

guidance[1] explained, the Copyright Office analyzes AI outputs by asking whether the output reflects human authorship, with artificial intelligence "merely being an assisting instrument," or whether the technology itself determined the expressive elements.

Applying these principles in two recent Review Board decisions (the final agency decision on registration applications), the Copyright Office determined that the claimants who generated images using the AI service Midjourney were not the "authors" of the output images because they had not exercised a sufficient level of creative control. But copyright can protect creativity in selecting, arranging, or editing AI-generated images, as well as other elements of works that include AI-generated material. The Office has registered a variety of works that included both AI-generated material and human authorship.

The Office is currently reviewing public comments on a wide range of questions related to copyright and generative AI, including questions about the copyrightability of prompts and the resulting outputs. Our AI NOI asks whether there are circumstances when a human using a generative AI system should be considered the ''author'' of material it produces, and if so, what factors are relevant to that determination. For example, is selecting the material an AI model is trained on and/or providing an iterative series of text commands or prompts sufficient to claim authorship of the resulting output?

Public comments, as well as information derived from stakeholder meetings, events and conferences, and the Office's own research, will all contribute to our analysis. Additionally, we are following the relevant technological, judicial and marketplace developments.

3. To what extent has the Copyright Office conferred with its counterparts across the world on the issue of copyrightability of AI generated works, and what does the Copyright Office believe is the impact of specific international jurisdictions recognizing copyrightability of AI generated works, but the US not doing so? How does that impact competitiveness of American businesses, when it is possible to copyright AI generated works under Japanese and Israeli law?

The Copyright Office believes that the global context of the copyright issues relating to generative AI is very important, given that the technology is trained, developed, distributed and used through contributions from around the world. I have personally discussed the issues and the Office's AI Initiative with copyright policy makers and academics from numerous other countries, including at international conferences in Europe, Australia and Asia. Other Copyright Office officials have participated in World Intellectual Property (WIPO) conversations on the subject and engaged with foreign counterparts at conferences and meetings.

The Copyright Office has also initiated its own examination of the international aspects. On July 26, 2023, we held a webinar on "International Copyright Issues and Artificial Intelligence," convening experts from different regions of the world to discuss international developments, from copyrightability and authorship, to AI training and exceptions and limitations.

[1] Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16,190 (Mar. 16, 2023) ("AI Registration Guidance").

These conversations have revealed that while countries generally share the goal of finding a balance between promoting technological innovation and safeguarding human creativity, various legal approaches are under consideration. In order to evaluate these approaches, the Office has asked the following question in our AI NOI: "Are there any statutory or regulatory approaches that have been adopted or are under consideration in other countries that relate to copyright and AI that should be considered or avoided in the United States? How important a factor is international consistency in this area across borders?"

We are aware that there are a few jurisdictions that follow the United Kingdom in providing for copyright protection of computer-generated works. Preliminary information indicates that these provisions have not yet been applied by courts in the context of subject matter generated by AI. Most other jurisdictions, however, agree with the U.S. view that copyrightability requires human authorship. For example, the European Union and Japan require human authorship for copyrightability, and Israel, while its law is less definitive, likely would do so as well. The areas of potential divergence in Japan and Israel, to which your question may be referring, involve limitations and exceptions to copyright protection, notably those related to text and data mining. The AI NOI also asked questions about these kinds of exceptions, and we expect to receive information about their potential impacts various sectors.

The Copyright Office is currently reviewing responses to the above questions as well as others posed in the NOI. We received over 9,700 initial comments by the October 30, 2023 deadline; reply comments are due November 29.

4. **In October 2022, the Copyright Office rejected the application of the derivative work exception to termination rights. Although it has been nearly a year since the rule was proposed and almost ten months since the deadline for comments to the rule, the Office has not issued a final rule. When should we expect a final rule on this issue?**

As you note, in October 2022, we issued a notice of proposed rulemaking (NPRM) on copyright termination and the application of the derivative works exception to the blanket statutory license established by the Music Modernization Act (MMA). In response, certain commenters, raised additional questions for the Office to explore. In addition, the Mechanical Licensing Collective (MLC) asked for specific guidance regarding how it should be processing royalties in connection with termination claims. After reviewing this feedback, the Office published a supplemental notice of proposed rulemaking (SNPRM) in September 2023 to allow the public to address the additional topics.

Initial comments in response to the SNPRM are due November 8, 2023, with reply comments due November 28. After these comments are submitted, the Office will draft and publish a final rule. We intend to work expeditiously to finalize the rule after the close of the comment period.