Question for the Record from Rep. Issa for Ms. Garcia
"Artificial Intelligence and Intellectual Property: Part III – IP Protection for AI-Assisted
Inventions and Creative Works"
April 10, 2024

1. Has the development of generative AI, and works created with generative AI, had any impact on the value of human-created works, or is it too soon to know? If it is too soon to know, what do you expect to happen based on the info available now? You encouraged Congress to exercise restraint with respect to legislation. What developments in case law or potential agency regulation should Congress look at to glean insight into potential legislation?

Response to Question for the Record from Chairman Issa for Prof. Kristelia García
"Artificial Intelligence and Intellectual Property:
Part III – IP Protection for AI-Assisted Inventions and Creative Works"

Prepared for the Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives

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Chairman Issa, thank you for your follow-up question, and for your thoughtful approach to the regulation of generative AI as it relates to copyright.

You asked me the following: "Has the development of generative AI, and works created with generative AI, had any impact on the value of human-created works, or is it too soon to know? If it is too soon to know, what do you expect to happen based on the info available now? You encouraged Congress to exercise restraint with respect to legislation. What developments in case law or potential agency regulation should Congress look at to glean insight into potential legislation?"

As we discussed at the hearing, the utilization of generative AI in copyright is still in the very early stages, and possibilities, attitudes, and consequences are constantly evolving. That said, there are (at least) two answers to your first question about whether AI-generated works have had an impact on the value of human-created works:

(1) First, with respect to wholly or substantially AI-generated works, a series of class action lawsuits recently filed by creators and their representatives describe a world in which AI-generated works effectively displace human-created works.[1] Some AI programmers appear to explicitly evidence an intent to compete with human creators.[2] This potential displacement was one of the primary sticking points in the recent Hollywood/SAG-AFTRA labor dispute, whose resolution places stringent restrictions on studios' use of generative AI, especially with regard to the production of digital replicas.[3] In sum, wholly or substantially AI-generated

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[1] *See, e.g.*, Sarah Andersen v. Stability AI Ltd, No. 3:23-cv-00201 (N.D. Cal.)(filed 1/13/23)(visual artists allege they are infringed by AI that (1) is trained on their copyrighted images, and (2) produces infringing outputs of their images; and Sarah Silverman v. OpenAI, Inc., No. 2:23-cv-03223(N.D. Cal.)(filed July 7, 2023)(book authors allege AI trained without permission on illegal copies of their books and produces detailed summaries of those books upon query).

[2] *See, e.g.*, https://twitter.com/ScottNover/status/1782198748002628003 (AI company Outlier solicits journalists to help them train their LLM on how to write journalism).

[3] Summary of 2023 Tentative Successor Agreement to the 2020 Producer-SAG-AFTRA Codified Basic Agreement and 2020 SAG-AFTRA Television Agreement, https://www.sagaftra.org/files/sa_documents/TV-Theatrical_23_Summary_Agreement_Final.pdf.

works presently demonstrate an ability to compete with, or even to replace, some human creators in some situations.

(2) Second, with respect to works only partially generated by AI, some creators are skeptical.[4] Other creators embrace the possibilities presented by generative AI. These latter creators utilize generative AI more like a tool to complement their own, independent creativity than as a means of originating works, and so tend to view the impact of generative AI on their human-created works as both positive and beneficial.[5]

As you note, I counseled legislative restraint at the hearing. This advice stems predominantly from the fact that it is still early days for generative AI and copyright, and so it's difficult to determine what sort of intervention, if any, might be most helpful. In order to refine my advice with regard to congressional action going forward, I would ideally like to see: (1) the outcome(s) of the creator lawsuits;[6] (2) the outcome(s) of the "memorization" suits like the one brought by the New York Times;[7] (3) the language and reasoning in additional registration determinations issued by the Copyright Office with regard to AI-generated works; and (4) the language and reasoning in any additional guidance issued by either or both of the Copyright Office and/or the USPTO with regard to generative AI.

To be sure, I share the inclination to preserve innovation in the AI space while also properly compensating artists for their work. In response to questioning from both Chairman Issa and Representative Lofgren asking about what this might look like, I mentioned, among other things, the possibility of establishing a compulsory licensing scheme for the use of copyrighted works by AI models.

A compulsory license would effectively set up a liability rule for the use of copyrighted works in the training and refinement of generative AI, meaning that AI developers could secure use of copyrighted works without *ex ante* permission from individual copyright owners, so long as the developers meet the statutory requirements, and pay the statutorily-dictated royalty(ies). Such a license is by no means a silver bullet, but it may be a step in the direction of conciliation and continued progress.

The music industry, with which I am most familiar, is an exemplar of what compulsory licensing can look like—for better and for worse—in the copyright industries.[8] By way of

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[4] *See, e.g.*, Kevin Roose, "An A.I.-Generated Picture Won an Art Prize. Artists Aren't Happy," (Sept. 2, 2022)(discussing the backlash against awarding an AI-generated artwork a prize) at https://www.nytimes.com/2022/09/02/technology/ai-artificial-intelligence-artists.html.

[5] See, e.g., Stacy Martinet, "Meet 13 inspiring creators using Generative AI to boost creativity," Fast Company (Oct. 11, 2023) at https://www.fastcompany.com/90962670/meet-13-inspiring-creators-using-generative-ai-to-boost-creativity.

[6] *See, e.g., supra* note 1.

[7] The New York Times Co. v. Microsoft Corp., OpenAI, 1:23-cv-11195 (S.D.N.Y.)(Filed Dec. 27, 2023)(alleging not only illegal scraping of and training on copyrighted works, but also illegal dissemination of outputs that copy and/or derive from copyrighted work).

[8] *See* 17 U.S.C. §§ 111 (cable transmissions), 112 (ephemeral recordings), 114 (public performance of sound recordings), 115 (making and distributing phonorecords) (as amended by the Music Modernization Act),

example, we can consider the performance right for digital transmissions, established by the Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA).[9] The DPRSRA introduced a performance right for digital transmissions with three distinct royalty tiers: (1) terrestrial broadcast retransmissions are exempt from payment; (2) noninteractive Internet radio platforms are subject to the statutory license, with rates set (and adjusted at regular intervals) by the Copyright Royalty Board; and (3) interactive Internet radio platforms must negotiate directly with copyright owners.[10]

A statutory license for the use of copyrighted works in the training of generative AI models could allow AI developers to continue to innovate while also compensating human creators for their work. That said, I see two primary challenges in establishing such a licensing scheme: The first is a challenge of scope. Each of the existing statutory licenses in the Copyright Act deals with a single genre of work—e.g., sound recordings, or television shows. A statutory license for the training of AI would need to encompass various genres of works, including music, books, film, pictorial and graphic works, television, and so on. These industries have historically expressed different needs and expectations.

The second challenge is rate-setting. While a statutory license could conceivably feature different royalty rates for different genres of work, the establishment (and regular adjustment) of those rates—particularly given the absence of a "market rate" to use as a benchmark—is a substantial task, and one that the CRB currently struggles with even in the single-genre context.

I view these challenges as substantial, but not necessarily insurmountable, and believe that the idea is certainly worth exploring as matters at the intersection of generative AI and copyright continue to unfold.

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119 (secondary transmissions for satellite carriers), and 122 (secondary transmissions by satellite carriers for local retransmissions).
[9] Pub. L. No. 104-39, 109 Stat. 336 (1995).
[10] 17 U.S.C. §114.