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Mr. Andrei Iancu
Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office
United States Patent and Trademark Office
600 Dulany Street
Alexandria, VA 22314

RE: Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation (84 F.R. 58141, Docket No. PTO-C-2019-0038)

Dear Director Iancu:

The American Association of Law Libraries (AALL) is pleased to submit these comments in response to the United States Patent and Trademark Office's (USPTO) October 30, 2019 Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation. We appreciate the USPTO's diligence in requesting input from stakeholders on intellectual property law and policy.

AALL's comments address Questions (1) whether a work produced by an Artificial Intelligence (AI) algorithm or process without human involvement should qualify as a work of authorship protectable under U.S. copyright law; (2) to what extent the involvement by a natural person is sufficient for a work to qualify for copyright protection; and (3) whether existing statutory language of the fair use doctrine and related case law adequately addresses the legality of ingesting large volumes of copyrighted material necessary for an AI algorithm or process to learn its functions.

I. A Work Produced by an AI Algorithm or Process, Without the Involvement of a Natural Person Contributing Expression to the Resulting Work, Does Not Qualify as a Work of Authorship Protectable Under U.S. Copyright Law.

The U.S. Copyright Office, case law in the United States, and laws and judicial decisions from around the world all support the notion that works created by non-humans are not protectable under copyright law.

As described in the *Compendium of U.S. Copyright Practices*, the U.S. Copyright Office will "register an original work of authorship, provided that the work was created by a

human being."[1] The U.S. Supreme Court has determined that copyright law protects works that are "the fruits of intellectual labor," which have been "founded in the creative powers of the mind."[2] Following this case law, the U.S. Copyright Office states, "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."[3]

The Ninth Circuit recently held in *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018), that non-humans lack statutory standing to sue under the Copyright Act. The court concluded that a monkey who took a photo of himself using a nature photographer's camera did not have rights to the selfies as an author. Terminology used in various provisions of the Copyright Act persuaded the Ninth Circuit that animals other than humans do not have statutory standing to sue under the Copyright Act. The Ninth Circuit stated, "The terms 'children,' 'grandchildren,' 'legitimate,' 'widow,' and 'widower' all imply humanity and necessarily exclude animals that do not marry and do not have heirs entitled to property by law."[4] If living animals cannot be authors of copyrighted works, non-living machines cannot either.

Beyond the United States, laws and judicial decisions from around the world also support the notion that only human-created works can be protected by copyright. For example, in Germany, an author can only be a natural person and "[o]nly the author's own intellectual creations constitute works within the meaning of [the German Copyright Act]."[5] In Australia, the Federal Court held that data sheets created by a computer program were not protected by copyright due to insufficient involvement by a human author in *Acohs Pty Ltd v Ucorp Pty Ltd* [2012] FCAFC 16 (2 March 2012).

II. AI-Produced Works Must Be Independently Created by a Human Author and Contain More Than a *De Minimis* Amount of Human Creativity to Qualify for Copyright Protection.

AI processes or algorithms provide valuable contributions to many copyrighted works, but a human must still contribute to the creation of the work more than a *de minimis* amount—beyond creating the machine or clicking a button to start a machine—for it to

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[1] U.S. Copyright Office, *Compendium of U.S. Copyright Practices* (3d ed. 2017), https://www.copyright.gov/comp3/docs/compendium.pdf.
[2] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 346 (1991) (quoting *Trade-Mark Cases*, 100 U.S. 82, 94 (1879)).
[3] U.S. Copyright Office, *supra* note 1 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).
[4] *Naruto*, 888 F.3d at 426. These terms appear in 17 U.S.C. §§ 101, 201, 203, and 304.
[5] Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, last amended by Gesetz [G], Sept. 1, 2007, § 2, https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html (unofficial English translation provided by Ute Reusch).

qualify for copyright protection. The U.S. Copyright Office "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."[6]

All works must satisfy an originality requirement to be eligible for copyright protection: the work (1) must be "independently created by the author" and (2) possess "at least some minimal degree of creativity."[7] The independent creation element requires the author to create the work without copying from other works.[8] The creativity element requires "some minimal degree of creativity" and "cannot be so mechanical or routine as to require no creativity whatsoever."[9]

As legal information experts, law librarians frequently encounter AI as they support the research needs of lawyers, judges, law faculty, law students, and the public. For example, some libraries utilize AI-powered Chatbots to answer general library-related or reference questions.[10] The scripts and answers written by human authors that have been loaded into the chatbot tool are protectable by copyright because these works are sufficiently original.

AI-powered tools are also utilized by libraries to improve search and discovery of library resources. Some tools can automatically analyze and assign metadata to resources in a library catalog so that the library catalog can generate a list of suggested or related resources for users to consider exploring. A suggested list of resources generated solely by an AI tool without any human intervention should not be eligible for copyright protection. However, if a librarian were to take that AI-generated list and then annotate and edit that list to create a guide for materials on a topic, that human involvement might be sufficient for the work to qualify for copyright protection. Researchers greatly benefit from AI tools when creating scholarship, as these tools can save them a significant amount of time with data analysis tasks. A researcher who incorporates patterns and trends automatically discovered by an AI-powered tool into an article that he or she writes would be free to register that article for copyright protection.

Academic law librarians teach law students how to use AI tools in legal research classes so they can use these tools in their clinic work or in future practice. Law librarians at firms support attorneys' work in utilizing AI-powered tools to make workflow more

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[6] U.S. Copyright Office, *supra* note 1, at 16–17.
[7] *Feist*, 499 U.S. at 345.
[8] *Id.* at 345.
[9] *Id.* at 362.
[10] Examples include the Law Library of Congress Chatbot or Northwestern Pritzker Legal Research Center's Amazon Alexa skill, both of which use AI tools to provide answers to frequently asked questions by library patrons.

efficient and to reduce errors. Law students and transactional lawyers use AI-powered tools such as Bloomberg Law's Draft Analyzer or Thomson Reuters Drafting Assistant to analyze and compare their draft agreements against similar language from existing agreements or precedent. Law students and litigators use AI-powered tools such as Casetext's CARA to identify relevant cases to possibly cite in briefs or motions or utilize litigation analytics to predict how judges will rule on motions based on past patterns.

AI-generated work that merely pulls and combines standard language from other documents to automatically generate a new document would not be sufficient to qualify for copyright protection because it lacks independent creation as well as human creativity. The U.S. Copyright Office has specifically indicated that "[a] standard form contract for a real estate transaction requesting factual information from the buyer and containing standard legal language for the release of the seller's interest in the property" is an example of a work that contains no original expression or only a *de minimis* amount of original expression, neither of which would qualify for protection under U.S. copyright law.[11] Additionally, the U.S. Copyright Office views "[s]ubstituting the pronouns 'she' and 'her' for 'he' and 'his' in a preexisting work of authorship" as only possessing a "*de minimis* quantum of creativity,"[12] so a legal document that merely fills in a client's name on a standard form generated by an AI-powered tool similarly would not be entitled to copyright protection.[13]

Many database providers and website operators also use artificial intelligence to improve search functions and provide legal research tools for users. For example, headnotes provide a way to quickly assess which cases are relevant or worthy of additional research. Headnotes may be created by mining the text of court opinions using an AI algorithm or process to automatically extract the legal points of law, or they may be written by human editors. The former should not receive copyright protection because they do not fulfill the originality requirement. The latter should receive copyright protection because they are both independently created and involve human creativity.

III. Statutory Language Should Include a Contract Preemption Provision to Prevent Interference with the Fair Use Right to Ingest Copyrighted Materials for AI Processes.

AI tools need to ingest a large volume of material—which may include both copyrighted material and uncopyrighted material—to learn their functions. Existing statutory language and case law supports the ingestion of copyrighted materials by AI tools as fair

[11] U.S. Copyright Office, *supra* note 1, at 22.
[12] *Id.*
[13] *Id.*

use.[14] Perhaps most prominently, in *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d. Cir. 2014), the Second Circuit held that the digitization of more than ten million copyrighted works to create a digital repository of content that permits full-text searching of these works is fair use.

AALL advises law librarians and vendors to enter into licensing agreements that "recognize and not restrict, abrogate or circumvent the rights of the licensee or its user community permitted under copyright law" and "recognize and accommodate reasonable and appropriate uses in an academic environment," which includes text and data mining for scholarly research.[15] Despite the statutory language and case law in support of a fair use right to ingest copyrighted materials for AI processes, publishers, database providers, and website operators may attempt to restrict or limit the ability of researchers or libraries to engage in text and data mining through license agreements. Libraries have already encountered similar limitations and restrictions on the distribution of e-books imposed by click-wrap or browse-wrap licenses.[16]
AALL recommends that USPTO consider proposing a contract preemption provision similar to what exists in the European Union (EU) Directive on Copyright in the Digital Single Market (Directive 2019/790) related to text and data mining.[17] Recognizing that licensing agreements for electronic resources often prohibit automated searching, scraping, or downloading content, the directive includes a provision to explicitly ensure that publishers cannot circumvent the EU Copyright Directive's text and data mining exception by contract or license.[18]

IV. Conclusion

AALL believes that a work produced by an AI algorithm or process must include the involvement of a natural person contributing expression to the resulting work, be independently created by a human author, and contain more than a *de minimis* amount

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[14] 17 U.S.C. § 107.
[15] *AALL Principles & Practices for Licensing Electronic Resources* (2018), https://www.aallnet.org/wp-content/uploads/2018/05/Principles-and-Practices-for-Licensing_05.30.2018_FINALpdf.pdf.
[16] Andrew Albanese, "S&S Changes Library E-book, Digital Audio Terms," *Publishers Weekly*, July 1, 2019, https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/80602-s-s-changes-library-e-book-digital-audio-terms.html (describing e-book lending models adopted by the Big Five publishers).
[17] Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L130/92), https://eur-lex.europa.eu/eli/dir/2019/790/oj.
[18] Article 7 of the European Union Copyright Directive (2019/790) states, "Any contractual provision contrary to the exceptions provided for in Articles 3 [Text and data mining for the purposes of scientific research], 5 [Use of works and other subject matter in digital and cross-border teaching activities] and 6 [Preservation of cultural heritage] shall be unenforceable."

of human creativity to qualify as a work of authorship protectable under U.S. copyright law. The Association also supports consideration of a contract preemption provision to ensure libraries may continue to benefit from the exceptions provided in the Copyright Act.

AALL reiterates its appreciation to the United States Patent and Trademark Office for undertaking this inquiry and for the opportunity to comment.