November 19, 2024

Shira Perlmutter
Register of Copyrights and Director
U.S. Copyright Office
101 Independence Avenue SE
Washington, DC 20559

Re: Artificial Intelligence and Registration of Computer Software

Dear Register Perlmutter:

Last year, the U.S. Copyright Office (USCO) launched an inquiry into the implications of artificial intelligence for copyright policy. USCO is announcing its analysis and findings in a three-part report, the first of which was published in July and focused on digital replicas. As USCO is finalizing the next parts of the report, we have been asked by some members to refine our position on the originality of AI assisted works, especially as applied to computer code.

In November 2023, SIIA submitted comments that reflected our consensus position as follows:

> *Question 18.* Under copyright law, are there circumstances when a human using a generative AI system could be considered the "author" of material produced by the system? If so, what factors are relevant to that determination? For example, is selecting what material an AI model is trained on and/or providing a series of iterative commands or prompts sufficient to claim authorship of the resulting output?

> *SIIA Response:* SIIA believes that the Copyright Office guidance got the important questions mostly right.[1] The originality standard is not a high one, but it does require human creativity. However, originality is a continuum: it is entirely possible that a series of iterative, human-drafted queries could result in a particular work meeting the originality standard. These matters will have to be evaluated on a case-by-case basis, and the Office was right to require some disclosure of the use of generative AI in registration applications while it tries to determine what that line is and how to draw it. We note, however, that AI is rapidly evolving. As use of these tools becomes more sophisticated and widespread and the tools themselves evolve, these disclosure requirements may need to be revisited if they prove to be unduly burdensome for authors and copyright owners.

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[1] The March 2023 guidance on works generated by AI stated, in relevant part: "applicants have a duty to disclose the inclusion of AI-generated content in a work submitted for registration and to provide a brief explanation of the human author's contributions to the work."

Registration is not a requirement for copyright protection to exist, but it is required to file a federal lawsuit, and if made before infringement commences, entitles the copyright owner to statutory damages and attorneys' fees if they prevail. The Copyright Act gives the USCO the authority to establish requirements consistent with the underlying substantive legal doctrines.

The availability of generative AI tools and recognition of their potential have advanced considerably since we submitted these comments and since the USCO issued its guidance. For computer code, some of our members believe that we are now at the point that the USCO's disclosure requirements ought to be revisited because of the burden placed on software developers. We agree that AI cannot in and of itself be an author, but further refinement is required on what constitutes human authorship in the creation of AI-assisted works. As it prepares its final report, we have been asked to convey the following points advocating for a change in registration practice.

- AI is now routinely used in the process of creating computer code, in most cases involving human creativity. That human involvement still exists on two fronts. First, in making decisions about which lines to modify, accept, rearrange, combine or delete, the engineers are using AI as a tool and controlling literary expression. Those expressive choices may satisfy the originality standard.

- Second, suggestions for code are often derived from a series of prompts as opposed to a blanket "write me a scheduling app." It is becoming increasingly common for AI tools to suggest new code and, as time progresses, this practice is expected to increase, with the AI essentially serving as an assistant. When that code results from a series of increasingly specific prompts, and is sufficiently reviewed, enhanced, combined and altered before inclusion in a codebase, authorship in the final code exists.

- The existing requirement to disclose all use of AI-powered coding tools is burdensome for code developers because code development with the assistance of AI tools is subject to copyright protection, but a failure to disclose will result in uncertainty over whether the registration will be canceled. We suggest that this requirement be amended in favor of a simple disclosure that AI tools were used in the development of the code and a certification that human authorship existed.

- We believe that such an approach balances the need for the USCO to remain current on industry practice in the face of a rapidly changing technology against Congress's expressed intention that formalities not burden obtaining the full panoply of rights under the copyright laws. In the very small numbers of cases that are actually litigated, authors of computer programs will have to prove originality in the courts, which are the best institutions for determining their truth.

This is intended to be a refinement of SIIA's position in response to wider adoption and use of the technology, and its main impact will be in the technical areas of registration practice and the burden imposed by the registration process. The intent is to better conform registration to

industry practice. (Similar suggestions have been aired by other industries, among them motion pictures and video games.) This refinement does not change the underlying law around authorship. Facts claimed in the registration still must be proven in court.

Thank you for considering our views.

Sincerely,

Christopher Mohr
President
Software & Information Industry Association (SIIA)