

Generative AI Training May Not Qualify for the Fair Use Defense

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Last week, the Copyright Office released the third and final [part](#) of its report exploring copyright-related issues posed by artificial intelligence (AI). Unlike the first two parts, the third was released as a “pre-publication” version. It was published less than a day after Dr. Carla Hayden, the Librarian of Congress, was fired by President Trump and a day before Shira Perlmutter, the Register of Copyrights, was fired by President Trump. Building off its earlier [parts](#), the latest publication focuses on how copyright law and the fair use defense should be applied to companies that use copyrighted works to train AI models.

The report concluded that companies presumptively infringe the copyright protections of others when they copy materials to use in training data. Additionally, the report concluded that the numerical parameters of the model can also be infringing when it can reproduce the copyrighted work as a memorized example.

However, the fair use defense permits copying another’s work. Many uses of copyrighted works by an AI model are likely transformative. However, the Office concluded that commercializing copyrighted works in training data to compete with the original works is unlikely to fit the fair use exception. AI models rapidly create new works that imitate a creator’s style. The Office concluded that this market dilution weighs against the fair use argument for generative AI companies.

Recognizing that the copyrighted data is needed in the training data, the report concluded by exploring different licensing frameworks that companies can use to acquire the data. The report does not recommend that the government intervene to establish a licensing regime right away, but that the market should continue to develop.

It is unclear if the Trump administration will rescind the report or issue a final report with changes. However, companies developing AI tools should likely consider the report regardless of the administration’s actions.

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