re:create

The Honorable Jonathan Kanter
Assistant Attorney General, Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Cc: The Honorable Shira Perlmutter, Register of Copyrights and Director, U.S. Copyright Office

Dear Assistant Attorney General Kanter and Chair Khan:

We write in response to a letter sent to your offices last week by Senator Klobuchar and seven colleagues in the Senate regarding the possible anticompetitive effects of generative artificial intelligence tools and services. As you consider whether the conduct described in the letter raises any potential antitrust issues, we urge you to be mindful of key settled principles of copyright law that address this conduct.

Local journalism faces an array of challenges, and those challenges should be taken seriously.[1] The markets in which local journalism competes should be fair, and the business models that sustain local journalism should be robust. At the same time, local journalists must play by the same copyright rules as the rest of the information ecosystem.

Copyright grants a limited monopoly in expressive works to give incentives for creativity, but importantly it also protects the free and fair use of facts, ideas, and even (under certain circumstances) expression contained in such works. This balance of rights ensures copyright not only serves its constitutional purpose—namely, to "promote the Progress of Science"[2]—but does so without running afoul of basic First Amendment protections. A collateral attack on conduct that is lawful under the Copyright Act could upset this delicate balance.

Copyright draws the boundary between lawful use and "misappropriation" of expressive works, including in news reporting,[3] food writing, search engines, and other domains referred to in the

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[1] *See, e.g.*, McKay Coppins, *A Secretive Hedge Fund is Gutting News Rooms*, The Atlantic (Oct. 14, 2021), https://www.theatlantic.com/magazine/archive/2021/11/alden-global-capital-killing-americas-newspapers/620171/.

[2] U.S. Const. art. I, § 8. *See also Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003) (observing that "[t]he rights of a patentee or copyright holder are part of a "'carefully crafted bargain,'" and that where those rights do not apply, "the public may use the invention or work at will.").

[3] Notably, the narrow state law tort of "hot news misappropriation" may be the lone example of an unpreempted tort in this realm, but there may not be much left of it after the Second Circuit's opinion in

Senators' letter. The remedy for a copyright holder who believes their work has been "misappropriated" is to bring a suit for copyright infringement, and authors and publishers have not hesitated to do so with regard to AI tools.[4] Courts have thrown out some copyright claims against AI companies because they are facially invalid,[5] but more substantive claims are still working their way through the courts. These important cases should be allowed to play out and provide additional guidance in the application of copyright to AI-powered technologies.

One thing, however, is clear: it is a deep and longstanding principle of copyright law that facts and abstract ideas are free for all to share and reuse. Because no one owns facts and ideas conveyed in a work, they cannot be "misappropriated." This principle has a rich pedigree, with roots in our country's founding era.[6] The Supreme Court has explained that, "copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.…This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."[7] Journalists themselves benefit from this principle when they include in their own reporting facts that were first revealed by other news outlets. It would be unfair in such cases to say that the first reporter is now "competing with content generated from their own work" because another journalist included the same facts in a subsequent story. Any journalist knows that, as the Supreme Court said, there's nothing unfair or unfortunate about this outcome. The freedom to report facts and ideas is a bedrock principle that has served journalism well for generations. More recently it has served online content creators, social media users, and others equally well.

The letter states that "some generative AI features misappropriate third-party content and pass it off as novel content." However, if what is shared by these features is purely factual information or ideas, then there is nothing proprietary to "pass off" under copyright law. The Supreme Court has explained that to require attribution for unprotected material would create "a species of mutant copyright law that limits the public's federal right to copy and to use" public domain information.[8] Similarly here, unless the outputs of an AI-powered tool are infringing, it would be inappropriate to create liability on a theory of misattribution of origin.

Generative AI is a burgeoning field, and it should certainly be subject to careful scrutiny to ensure consumers get the benefit of fair competition in the market for AI-powered services.

Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876 (2011). *See generally* Shyamkrishna Balganesh, *The Uncertain Future of "Hot News" Misappropriation After* Barclays Capital v. Theflyonthewall.com, 112 Colum. L. Rev. Sidebar 134 (2012), https://scholarship.law.columbia.edu/faculty_scholarship/3152.

[4] *See generally* Edward Lee et al., *Status of all copyright lawsuits v. AI* (Mar. 12, 2024), https://chatgptiseatingtheworld.com/2024/03/12/status-of-all-copyright-lawsuits-v-ai-mar-12-2024/.

[5] *See* Dave Hansen & Yuanxiou Xu, *The AI Copyright Hype: Legal Claims That Didn't Hold Up*, Authors Alliance (Sept. 3, 2024), https://authorsalliance.substack.com/p/the-ai-copyright-dismissed-claims.

[6] *See* Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 The Writings of Thomas Jefferson 326, 333-35 (Andrew A. Lipscomb ed., 1903) ("He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature….").

[7] *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).

[8] *Dastar*, supra n. 2 at 34 (internal quotations removed).

However, issues at the heart of copyright law, like the line between unlawful infringement and lawful free and fair uses, should be resolved first and foremost according to copyright principles. Copyright law has ample tools and frameworks to sort lawful uses from infringing ones. If the Antitrust Division or the FTC decides that further investigation under its own authorities is warranted, we urge that the investigation be broadly inclusive and consider the views of all stakeholders, including the many communities who rely on the public domain and fair use.

Respectfully,

Brandon Butler
Executive Director
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