Three Copyright Issues Implicated by Generative AI

• Does ingestion for training AI constitute infringement?
• Does output infringe?
• Is output copyrightable?

The answer is different in different jurisdictions
Does Ingestion Infringe?

• Training AI requires ingestion of millions of works.
• Software analyzes these works to discover patterns, relationships, and trends, which are reflected in the AI “model.”
• Most of the countries that have examined this issue have determined that ingestion for AI training does not infringe.*
Does Ingestion Infringe?

• US: Several courts have found that assembly of large databases for AI functions such as search and plagiarism detection are fair use.

• But these AI functions were more basic (and less likely to have competitive impact) than generative AI

• Several pending cases, including one by comic Sarah Silverman

• Israel Ministry of Justice opinion letter finds that copying involved with machine learning is a fair use.
Does Ingestion Infringe?

- EU Copyright in the Digital Single Market Directive Art. 3: permits text and data mining for noncommercial scientific research of lawfully accessed work (is TDM the same thing as AI?)
- EU CDSMD Art. 4: permits text and data mining for other purposes subject to opt-out.
- EU proposed AI Act: would require disclosure of categories of inputs.
- Most companies that scrape works from the Internet respect robot exclusion protocols.
- Singapore and Japan also have exceptions for ingestion.
Does Output Infringe?

• This can be assessed under traditional copyright principles
• In the US: 1) was there access to the original work?; 2) is the output substantially similar in protected expression?
• Who is liable? AI provider as well as user? Who is a direct infringer and who is a secondary infringer?
Is Output Copyrightable?

• US: Only works reflecting human originality can receive copyright protection. So work created completely by GAI is not protectable. But user directs the AI with prompts: at what point is their sufficient human originality?

• Copyright Office: Must disclose what is created by GAI. This might be more difficult than Office thinks.

• Most other countries have similar human originality requirement, except UK: Copyright Designs and Patents Act 1988 expressly provides for copyright protection of computer-generated works without a human creator.
Thank you for your attention!