Who Is Liable for Infringing Generative AI Output?
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Generative Artificial Intelligence ("GenAI") are trained on massive inputs of copyrighted works, and hitherto scholarly attention and pending litigation has largely focused on input liability. The potential for GenAI to produce infringing outputs was initially dismissed as improbable or solely the result of aberrant "adversarial" prompts. However, recent studies have made it clear that GenAI output bearing substantial similarity to preexisting copyrighted sources occurs with nontrivial frequency. This begs the question of who is liable for generating such infringing output? The two obvious candidates for liability are (1) the user; and (2) the GenAI system. This project considers each of them in turn, focusing on direct, prima facie infringement.

User liability, in most cases, will hinge on the particular prompt that the user enters and the actual or inferred intent behind that prompt. Entering a textual prompt that is intended to yield output that, in whole or in part, incorporates expressive elements drawn from a specific preexisting copyrighted work will result in prima facie, direct copyright liability where the resulting output in fact, contains such expressive elements to a substantially similar degree (assuming a valid copyright and lack of consent). Liability for the GenAI system, by contrast, will hinge largely on the actual or inferred inclusion of the preexisting copyrighted work in the training data ingested by the underlying GenAI model. In the absence of direct evidence, such ingestion will generally be established based on access and probative similarities. If ingestion can be shown or inferred, then the generation of substantially similar output will result in prima facie liability for the system. Direct liability is appropriate here because the GenAI system is generating an infringing copy drawn from its own ingested library of copyrighted content, and the volitional act of assembling such a library and making it available for GenAI system users to copy justifies direct liability.