Request for Information (RFI) on Public and Private Sector Uses of Biometric Technologies: Responses

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Comments of the Recording Industry Association of America on the Office of Science and Technology Policy Notice of Request for Information on Public and Private Sector Uses of Biometric Technologies

Delivered via email to BiometricRFI@ostp.eop.gov

<RFI Response: Biometric Technologies>

January 14, 2022

The Recording Industry Association of America (“RIAA”) welcomes this opportunity to respond to some of the questions posed by the Office of Science and Technology Policy (“OSTP”) in its request for information (“RFI”) regarding public and private sector uses of biometric technologies.

The RIAA is the trade organization that supports and promotes the creative and commercial vitality of music labels in the United States, the most vibrant recorded music community in the world. Our membership – which includes several hundred companies, ranging from small-to-medium-sized enterprises to global businesses – creates, manufactures and/or distributes sound recordings representing the majority of all legitimate recorded music consumption in the United States. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conducts consumer, industry, and technical research; and monitors and reviews state and federal laws, regulations, and policies.

RIAA’s interest in this RFI relates primarily to general principles that should be employed whenever copyrighted sound recordings or music videos are used to train artificial intelligence enabled applications, including AI-enabled biometric technologies.

Introduction

The United States boasts over one million revenue-generating sound recording artists and songwriters. Overall, the music industry contributes $170 billion to the nation’s economy, supports 2.47 million jobs and accounts for over 236,000 businesses in the United States. At the core of all this activity is the creativity of sound recording artists, songwriters, musicians, producers, recording engineers and countless other participants in the music industry that bring

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music to life. Their creative output is protected by copyright, which is both recognized in the U.S. Constitution\(^4\) and in the U.N. Universal Declaration of Human Rights.\(^5\)

With this background in mind, we offer the following comments.

**Question 6: Governance Programs, practices or procedures applicable to the context, scope, and data use of a specific use case.**

To ensure that any AI enabled implementation is transparent, fair, and accountable, including any biometric AI enabled technology, the AI developer should implement the following processes:

*Licensing and Clearances.* The AI developer should use only those training materials for which either the AI developer has received appropriate licenses or clearances for the reproduction or other exploitation of those materials, or training materials that are in the public domain. OSTP should prohibit the use of any copyrighted materials for training unless the AI developer has received the appropriate licenses or clearances. Wholesale copying of sound recordings merely for the purpose of “training” an AI system is an insufficient basis for a finding of fair use, much like wholesale copying for the training of human students is not fair use.\(^6\) As courts have found, where a use would not constitute fair use when done in the physical world, it does not constitute fair use in the digital world.\(^7\) Similarly, where wholesale copying would not be considered fair use for teaching humans when performed with older technologies, it should not be considered fair use later when done to “teach” an algorithm with newer technologies. Accordingly, and to avoid harm to rights holders and mitigate the risk to AI developers, AI developers should obtain licenses or other clearance to use any copyrighted training materials, or they should instead rely on public domain materials.\(^8\)

*Record keeping.* In addition, an AI developer should maintain adequate records of at least the following: what copyrighted works or other materials are being ingested by the AI process and

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\(^4\) U.S. Const. art. 1, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;”).

\(^5\) art. 27, § 2 (“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”).

\(^6\) See e.g. Blackwell Pub’g, Inc. v. Excel Research Grp., LLC, 661 F. Supp. 2d 786 (E.D. Mich. 2009) (third party copying copyrighted content in course packs without authorization to sell them to students not fair use); Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1995) (copying of articles by researchers beyond what was permitted in the license for the articles was not fair use); Weissmann v. Freeman, 868 F.2d 1313 (2d Cir. 1989) (professor’s unauthorized copying and distribution of a copyrighted article to his students not fair use); Educ. Testing Serv. v. Katzman, 793 F.2d 533 (3d Cir. 1986), abrogated on other grounds by eBay, Inc. v. MercExchange, LLC, 547 U.S. 388 (2006) (copying of a copyrighted test for test preparation education not fair use).

\(^7\) Brammer v. Violent Hues Prods., LLC, 922 F.3d 255, 269 (4th Cir. 2019) (“Such a use would not constitute fair use when done in print, and it does not constitute fair use on the Internet.”).

\(^8\) OSTP should be wary of making any recommendations concerning the use of training materials under the fair use doctrine. The fair use doctrine is a fact-intensive inquiry that requires a deliberative analysis under the four factors for fair use set forth in 17 USC § 107. Therefore, relying on fair use should not be taken lightly or without a full grasp of the relevant facts of each particular situation.
for what purposes; copies of the licenses or clearances the developer has obtained to use the works or materials for such purposes; and what are the outputs of the AI process. Because AI ingestion or “training” will typically not happen in the public eye, it will be difficult if not impossible for copyright owners to monitor the unauthorized use of their intellectual property without such records. Proper record keeping of what content was ingested as part of the AI process should help ensure transparency and enhance accountability. In addition, such record keeping with respect to the licenses or clearances obtained will act as a check against rampant infringement in connection with AI inputs. It also can help track potentially problematic AI outputs, such as “deep fakes” or other outputs that may infringe intellectual property rights. This will help ensure fairness and build trust.

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We thank OSTP for the opportunity to submit our views.

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