

AI OVER-FIXATION

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Abstract

Fixing a work in a tangible medium of expression took on many new forms over the first 50 years of the Copyright Act of 1976. From tape-recorded broadcasts to computer RAM to Alexa, the methods by which we fixed our original ideas were not static. But as technology changed, we continued to see a relatable model for fixation: users direct machines to be their scribes for original works of authorship. Whether it is via a keyboard to a computer or a wake word to Alexa, authors provided intentional direction to machines to capture their ideas.

This intent-model of fixation breaks down in a world of ubiquitous AI assistants. AI assistants transcribe and store our every word, whether we know it or not. Popular devices in stores today clip on your clothing and take down everything you say or do, along with the activities of those around you. Businesses are equipping their conference rooms with discreet AI assistants to summarize meetings. Video conferencing companies compete on the competence of their always-on AI assistants in their software. And AI motion-triggered audio/visual recording is on every doorbell and street corner. Fixation is no longer “pen to paper;” it is not even “finger to ‘on’ button.”

This Article argues that the future of copyright must include principles for when original works are created by human authors but fixed under the authority of AI. The Article explores three models. First, an author-intent model, which requires specific intent by an author to fix their expression during their creative activities. This approach causes copyright to walk away from authors when valuable expression is unknowingly recorded by AI. Unknowing recordings without any human authority will be increasingly common as AI assistants grow. We cannot ignore that creative works deserving of protection will be fixed by AI tools without specific intent; we need an authorship principle for these circumstances.

Second, the Article explores an operator-model, assigning fixation authority to a human who implemented the AI tools. An Operator model grants far too much control to humans with no particular relationship to the

expression. Such an approach would create a new kind of work for hire-like doctrine and exacerbate power imbalances in copyright authorship.

As a third option, the Article advocates for a notice-and-endorsement model, requiring humans who intend to exploit AI-fixed works containing the copyrightable expression of others to inform the other authors of the fixation. The author can endorse or renounce the fixation after-the-fact. This gives unknowing authors agency over their works. The notice-and-endorsement model is rooted in strains of current doctrine but bolsters it to suit our ever-growing AI fixation.

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