



December 12, 2022

The Honorable Thom Tillis
United States Senator
113 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Chris Coons
United States Senator
218 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators Tillis and Coons:

Thank you for your October 27 letter requesting that the U.S. Patent and Trademark Office (USPTO) and the U.S. Copyright Office jointly establish a national commission on the intellectual property (IP) issues related to artificial intelligence (AI) by October 17, 2023. As stated in the letter, the goal of such a commission would be to “assess the role of AI across all aspects of our innovation economy and consider what changes to existing law, if any, should be made in order to continue to encourage the robust development of AI and AI generated inventions and creations.” The commission would be comprised of as diverse a membership “as possible in order to ensure the most robust recommendations.”

We agree with your view that the IP issues involved in AI are complex and growing in urgency and importance. Both of our agencies have been monitoring and will continue to closely monitor AI technology and its expanding applications. We are actively and directly involved in the development of legal and policy measures related to AI’s contributions to copyrighted works and patentable inventions, which raise questions about both authorship and inventorship. We each are committed to thoughtfully examining both the current and future implications of AI on our nation’s IP laws. We have been hosting and will continue to host public events and consultations in the coming months. We have described these efforts below.

We are confident that these steps will lead to improved understanding of these issues and enable recommendations for appropriate next steps. We look forward to discussing our findings and what a national commission might be able to accomplish.

Current and Planned Activities of Both Offices

Both our offices are active in issues involving the intersection of IP law and AI. There is much work to be done in this important space, and both offices are actively pursuing avenues to support the innovations and creations related to this emerging technology.

The congressionally created National Security Commission on Artificial Intelligence (NSCAI), whose final report was submitted to Congress in October 2021, represented a two-year investigation by policy experts with contributions from across government, including the USPTO. In its final report, the NSCAI recognized that strong IP policies that foster emerging technologies like AI are a critical element in our national security and economic competitiveness strategy. The NSCAI report also noted that China is both leveraging and exploiting IP policies as a critical tool within its national strategies for emerging technologies, while the U.S. has failed to similarly recognize the importance of IP in securing its own national security, economic interests, and technology competitiveness. According to the NSCAI report, the consequence of this policy void is that the U.S. could lose its prime position in IP global leadership. The NSCAI made recommendations to Congress and the President to recognize IP as a national priority and require the development of a comprehensive plan to reform and create IP policies and regimes that further national security, economic interests, and technology competitiveness strategies. For its part, the USPTO is actively evaluating and pursuing IP considerations within its existing authorities that incentivize and protect the growth of AI and emerging technologies to help ensure continued U.S. leadership in these critical areas. The USPTO is ready and willing to work with you and other leaders in Congress on legislative actions that may also be needed, both coming out of the NSCAI draft legislative suggestions and beyond.

The USPTO has long recognized the potential impacts that modern advances in AI could have on America's IP rights system. For example, in January 2019, the agency hosted an international roundtable titled "Artificial Intelligence: Intellectual Property Policy Considerations" and convened experts from across the globe for a day-long event. The agency continued to engage stakeholders on the intersection of AI and IP through a series of stakeholder engagements via the Federal Register that culminated in an October 2020 report, "Public Views on Artificial Intelligence and Intellectual Property Policy."

Recognizing the importance of incentivizing and protecting AI-driven innovation, the USPTO continues to actively pursue public engagement on these issues. One such way is through the AI and Emerging Technology Partnership. Our inaugural Partnership event in June 2022 featured a panel on "Inventorship and the Advent of Machine-Generated Inventions," touching upon both the current state of play and the future of AI's evolving role in the inventive process. In September 2022, we held the second Partnership event in our Silicon Valley Regional Office, at which we explored how AI is being used for innovation within biotechnology and the life sciences, including in drug discovery, personalized medicine, genomics, and synthetic biology.

The USPTO is also actively engaged in conversations across government, with scholars, and with the public regarding the impact of the Federal Circuit's recent decision in *Thaler v. Vidal*. While the current U.S. patent laws do not permit an AI system to be an inventor, important policy questions and decisions surrounding inventorship will continue to develop, especially as

AI systems play a growing role in the invention creation process. In the coming months, the USPTO will continue to study the impact of the *Thaler v. Vidal* decision and AI's role in the inventive process through the Partnership and other channels.

Finally, the USPTO will continue to play an important role on interagency committees on AI, including groups overseen by the Office of Science and Technology Policy, such as the National Science and Technology Council Machine Learning and Artificial Intelligence Subcommittee and the Networking and Information Technology Research and Development AI Interagency Working Group. These interagency engagements will ensure that our efforts on AI issues, including AI-driven innovation, reflect the Administration's whole-of-government approach to AI. The USPTO also has been actively engaging with the innovation community and experts in AI in the private sector and within government to support the National AI Initiative.

Similarly, the Copyright Office is engaged in a number of ongoing matters touching on the copyright-related aspects of artificial intelligence. Most notably, the Office is defending its refusal to register a two-dimensional work of art that was purported to have been created solely by AI, without any human authorship, before a district court in *Thaler v. Perlmutter*. At the same time, the Office's registration division examines registration applications for works that might include some elements of AI contributions, and are working to ensure that such AI-led elements are properly identified and disclaimed. In addition, the Supreme Court is currently examining the copyright fair use doctrine in *Andy Warhol Foundation for the Visual Arts, Inc. v. Lynn Goldsmith, et al.*, and the outcome of that case could provide important legal guidance impacting the use of copyrighted works in machine learning and artificial intelligence.

Looking ahead to 2023, the Copyright Office plans to host public events on artificial intelligence, building on our prior symposium in February 2020 event on "Copyright in the Age of Artificial Intelligence" with the World Intellectual Property Organization (WIPO) and the October 2021 event on "Copyright Law and Machine Learning for AI" the Office co-hosted with the USPTO. The Copyright Office is also exploring whether new training is necessary for its registration specialists as more works incorporating AI outputs may be submitted for registration, and will be examining whether changes to the Office's registration applications and regulations are necessary. Later in 2023, the Copyright Office expects to issue a public notice of inquiry on questions involving copyright and AI. Throughout all these efforts, the Office will be reaching out to a diversity of stakeholders for their input on these questions, as that is its long-held practice and is reflected in its "copyright for all" strategic goal.

National Commission

As noted above, we look forward to discussing our findings and what a national commission might be able to accomplish. We also look forward to your thoughts on what such a commission might look like and how we might put it into effect.

Though we are not aware of any precedent for a cross-agency commission considering IP issues, on the copyright side there is one prominent example: In 1974, Congress directed the Library of Congress to create a National Commission on New Technological Uses (CONTU), which was charged with examining the scope of copyright protection for computer programs for a period of

three years. *See* Pub. L. No. 93-574 (Dec. 31, 1974). That law established a commission with 13 voting members. The law also supported the hiring of a staff of a dozen employees and paid a then-\$100/day stipend to the commission members. The appropriation ended before the work was completed, so the commission obtained an extension of its appropriated authority for fiscal year 1977. The Library of Congress, including Copyright Office staff, provided talent, information, and administrative support, and CONTU delivered its final report to Congress on July 31, 1978.

For the Copyright Office, which relies in part on congressional appropriations, the costs of establishing a commission on AI would present a potentially significant expenditure that has not been planned for within the budget and would impact the ability to satisfy previously-approved uses of appropriated funds. If the model of CONTU were to be followed (and expanded to include a cross-agency collaboration), then legislation outlining the specific scope of work and containing appropriated funds to hire staff as well as pay commission members for their travel and participation would be needed. For example, the NSCAI was created through legislation by Congress (Pub. L. No. 115-232, SEC. 1051) with an authorization of \$10,000,000 and 15 members appointed by Congress and the Administration.

Thank you again for your letter. We remain proud of the ongoing collaborative work between the USPTO and the Copyright Office to advance our shared goal of a stronger and more inclusive IP system. We look forward to continuing to work with you and your office to advance American creativity and innovation, here and abroad.

Sincerely,



Kathi Vidal
Under Secretary of Commerce for
Intellectual Property and Director of the
United States Patent and Trademark Office

Shira Perlmutter
Register of Copyrights and Director of the
United States Copyright Office