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### Copyright Office To Consider AI Proposal as Part of the Current DMCA Triennial Review

A key feature of the 1998 Digital Millennium Copyright Act (DMCA) is its prohibition of circumventing access controls that have been implemented to protect copyrighted works. As part of the Copyright Office’s ninth triennial review of the DMCA, the office announced on October 19, 2023, that it is considering, and seeking public comment on, seven different carveouts to this prohibition, one of which would provide an exemption for researchers examining biases within artificial intelligence (AI) models. If any of the proposed exemptions are ultimately approved, they will be in effect from October 2024 to October 2027.

#### Triennial Review Background

Every three years, the Copyright Office conducts a public rulemaking in order to advise the Librarian of Congress on any proposed exemptions to the prohibition on circumvention under the DMCA. In general, the Copyright Office’s goal is to determine whether there are classes of works where, in the following three-year period, the prohibition is likely to adversely affect the ability of users to make non-infringing use of such works.

The seven exemption proposals for the upcoming triennial review (published in the Federal Register on October 19, 2023) are based in part on petitions the Copyright Office has received to date. The Copyright Office will engage in three rounds of public comment. Those supporting the proposed exemptions, or who have no position but want to submit evidentiary information, must submit their comments by December 22, 2023. Those opposing an exemption then have until February 20, 2024 to submit their opposition. Reply comments from supporters of a proposed exemption and those that neither support nor oppose a proposed exemption are due by March 19, 2024.

#### Use of Copyrighted Works To Examine Bias Through AI

The AI-related exemption proposal issued for comment by the Copyright Office would allow “researchers” to circumvent technological protective measures (TPMs) that control access to copyrighted generative AI models “solely for the purpose of researching biases” within those models. The proposed exemption would also permit “sharing the research, techniques, and methodologies that expose and address biases.”

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The proposal for this exemption, set forth by Jonathan Weiss of Chinnu Inc., an information technology security and consulting company (Weiss Proposal) stated: “In an era where AI-driven decisions increasingly impact our daily lives, ensuring these decisions are fair and unbiased is not merely a technical necessity but a societal imperative. By granting this exemption, we can promote responsible AI research, ensuring a more equitable and secure future for all.” The Weiss Proposal includes four reasons for the proposed exemption:

- **Public Interest:** Investigating bias in AI models is of paramount importance to ensure fairness, prevent discrimination and safeguard societal values.
- **Accelerating Knowledge:** Researchers would be able to unearth, understand and rectify biases without the constant fear of legal repercussions.
- **Security Implications:** Biased AI systems can be exploited or gamed. Understanding these biases is a crucial step in improving the overall security of these systems.
- **Promoting Transparent AI:** With the freedom to investigate and publish findings, the AI research community can push for more transparency and accountability in AI development.

The Copyright Office noted, in publishing this proposal, that the Weiss Proposal does not specify how a “researcher” would be defined, nor how TPMs are used by AI models such that they need

to be circumvented to study bias. Rather, the Weiss Proposal offers three guardrails to prevent misuse of this proposed exemption:

1. The exemption would apply only where the “primary intention is to identify and address biases, and not to exploit them.”
2. Any research must “prioritize data privacy, ensuring that no personal or sensitive data is compromised.”
3. Researchers should “actively engage with AI developers and stakeholders to address discovered biases.”

The Copyright Office has sought comment with respect to whether the Weiss Proposal should be adopted, including any proposed regulatory language, and has specifically asked commenters to describe the relevant TPMs and whether their presence is adversely affecting non-infringing uses as required for a DMCA exemption. The office also asks commenters to identify whether eligible users may access the AI software through alternate channels that do not require circumvention of TPMs, and the legal basis for concluding that the proposed uses are likely to be non-infringing.

## Key Points

The proposed AI exemption is yet another example of how the Copyright Office is wrestling with the intersection of copyright law and AI. While the Weiss Proposal is limited to a narrow AI use case, input the Copyright Office receives on this proposal will likely shape its broader view of AI issues.