Legislative Proposals to Protect the Creative Professions and Mitigate Risk of Harm from Generative AI, August 10, 2023

We are organizations that represent creative professionals from diverse backgrounds. Collectively, our members include book authors, freelance writers, journalists, playwrights and dramatists, visual artists, songwriters, composers, lyricists, photographers, graphic designers, and other creative professionals.

Generative AI technologies pose a serious threat to our members' professional creative futures, and we believe that guardrails around their development and use are urgently needed to mitigate the profound financial and cultural harm that the unregulated use of generative AI will almost certainly bring to the creative professions. There is a serious risk of market dilution from machine-generated works that can be cheaply mass-produced, and which will inevitably lower the economic and artistic value of human created works.

We believe that it is inherently unfair to use and incorporate the works of creators in the fabric of AI technologies and their outputs without the creators' consent, compensation, or credit, including creating derivative works that will actually compete with those original human creators. We are asking for interventions to safeguard the incentives that fuel the creation of a rich and diverse creative culture and markets, so vital to our democratic culture that they are inscribed in the Constitution.

We are lobbying for laws, regulations, and policies that recognize the following and require:

1. Consent and Compensation: Require all generative AI companies to seek permission for the use of creators' works in generative AI systems, and to fairly compensate creators who allow their works to be used in "training"[1] of generative AI;

2. Credit and Transparency: Create obligations for all AI companies to disclose what datasets and works they use to "train" their AI systems in the past, present, and future;

3. Permission and Payment for use in outputs: Require all AI companies to seek permission and pay compensation when creative works are used in outputs, or when names or identities or titles of works are used in prompts—whether through adding a new economic right under copyright law or as a *sui generis* right, and through a broad, well-articulated federal right of publicity law;

4. Labelling AI-generated content: Require the conspicuous labelling of AI-generated works as such, with enforcement provisions;

5. Permission for Generative AI's Use of a Person's Identity, Persona, or Style in a Federal Right of Publicity: Create a federal right of publicity that would simplify bringing a claim for use of voice, name, image, or other indicia of a creator's identity (whether such creator is living or deceased). Unlike current state right of publicity laws, we believe that it should also encompass a creator's style where readily recognized by the relevant consumers; and

6. Prohibit Removal of Copyright Information in the Ingest/Training Process: Amend section 1202 of the Copyright Act so that it is a violation to intentionally remove "copyright management information" from a copyrighted work in order to train AI or create an AI training dataset without permission of the copyright owner, whether or not it can be proven that it was knowingly done to induce or enable infringement; and

7. No copyright for AI-generated outputs: Retain the current copyright law requirement that copyrighted works be human created; we oppose efforts to deem AI-generated content protectible under copyright law, or through the creation of even a limited *sui generis* right. Providing copyright or similar incentives to use AI to generate content will exacerbate the threat of AI-generated content flooding and overwhelming the market for human works that the Constitution seeks to promote and protect.

[1] We use the term "train" to refer to AI developers' use of pre-existing works in developing their AI only because it has become the standard shorthand. That said, we have reservations about the semantics of the word because it makes the incorporation of copyrighted works into generative AI sound like a one-time use and serves to anthropomorphizes machines—as if they are simply "reading" or "observing" texts and other works. The reality is that the works are used to build the AI program and remain part of its fabric. There is no generative AI without the material that AI is purportedly "trained" on.

Legislative Proposals for Protecting the Creative Professions

1. Consent and Compensation

Free-Market Collective Licensing

The current generative AI technologies were mostly "trained" on unlicensed copyrighted works. Neither consent, credit, nor compensation was provided. We ask Congress to clarify and remind AI companies that the law requires authorization to embody creative copyrighted works in generative AI technologies—outputs that will inevitably compete with and usurp the market for the ingested original human works on which they are based. Individual creators and small creator businesses also need congressional assistance so that they can establish a private, efficient, and cost-effective collective licensing system to provide AI companies with the appropriate rights in exchange for fair compensation.

Because it is not efficient for AI companies to attempt to seek licenses from each of the hundreds of thousands or millions of individual creators or small businesses who own the rights to their copyrighted works, they are unlikely to do so. The major AI companies have instead pushed the bounds of fair use and have simply risked getting sued by creators; and they will continue to use works without permission unless an efficient way to obtain licenses is developed.

Where the numerosity of creators or other copyright owners is a hindrance to licensing, collective licenses have proven an effective means of providing licenses on behalf of a very large number of individual creators for specific uses. Here, collective licensing could solve the problem of how to license a mass number of works to AI developers for AI training on behalf of individual creators and small business on an industry-by-industry basis. The licenses would be offered in the free market on a non-exclusive basis to licensees—meaning that copyright owners can always directly license and that there can be more than one organization offering a collective licensing solution. Some corporate copyright owners have indicated a preference for direct licensing but would also be welcome to join as well. Each collective management organization (CMO) would negotiate fees with the various AI companies and then distribute those payments to the creators and other copyright owners who have registered with the CMOs, setting aside funds for those who have not yet registered but might in the future. We envision offering licenses for past uses of copyrighted works in AI systems, as well as future uses.

Collective licensing is an established concept and an effective means of paying creators and publishers where licensing creates market inefficiencies. Such licenses have been used in the music industry for decades, for television programming, by the Copyright Clearance Center for text licenses, and by other entities. For over two decades, the Authors Registry and the Authors Coalition of America have distributed royalties received from foreign collective licenses to U.S. authors and visual artists. More recently the American Society for Collective Rights Licensing (ASCRL) has distributed royalties received from foreign collective licenses to U.S. authors, artists, photographers, and other rights holders, and the Artists Rights Society (ARS), a membership organization affiliated with the Paris-based CISAC, collects licensing income and manages licensing requests on behalf of more than 70,000 artist members, the majority of whom create works of fine (rather than commercial) art.

What stands in the way of collective licensing is the fact that antitrust laws impose risks to forming CMOs that set rates on behalf of their members. As such, the CMOs and their members might be exposed to public and private antitrust action.

Legislative Request: Accordingly, we seek clarification that these specific AI-use collective licenses will not violate U.S. antitrust laws.

Extended Collective Licensing

For the mass, indiscriminate training of AI that has already taken place, where the AI companies may not be able to identity all works that the AI was trained on, they will need blanket licenses that would cover all of the potential works. An extended collective license (ECL) would assist with this. It is a type of collective rights licensing where qualifying organizations that represent a large number of a particular class of creators can negotiate licenses in the marketplace for a specific type of use on behalf of the entire class of copyright owners, whether or not they are current members of the organization. There must, however, be an effective mechanism for non-members to opt out of the licenses.

Legislation is necessary to authorize these types of licenses (which otherwise must be provided on an opt-in basis). They are an efficient and rational way to license rights in cases of mass use, such as where rightsholders are numerous individual creators, and the users cannot negotiate directly with all of them due to their sheer numbers. The ECL legislation would specifically authorize qualifying organizations to negotiate blanket licenses on behalf of the entire class of creators on an opt-out basis.[2]

The Copyright Office could be given the authority to authorize organizations who meet certain criteria to enter into agreements with the users—the generative AI companies—for the extended collective license. The requirements might include, for instance, demonstrating that the organization represents a broad group of impacted rightsholders, that its membership consents to an ECL, and that it adheres to sufficient standards of transparency, accountability, and good governance. Once authorized, a CMO would be entitled to negotiate royalty rates and terms with AI developers on behalf of an entire class of creator and copyright owner members without government rate-setting or oversight responsibilities.

Creators in those classes would have the right and ability to opt out of such licenses. The Copyright Office would issue regulations to ensure that robust notice was provided to the covered class of authors of their right to opt-out and that the procedures for doing so are simple and readily available.

[2] For examples of ECLs, see Swedish Copyright Act, Chapter 3a: Lag (1960:729), English translation located at https://www.wipo.int/wipolex/en/text/532409; Denmark's Consolidate Act on Copyright 2014 (Consolidate Act No. 1144 of October 23rd, 2014), Section 50-52, English translation located at https://www.wipo.int/wipolex/en/text/546839; DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, Article 12; located at https://eur-lex.europa.eu/eli/dir/2019/790/oj.

Creators who authorize a CMO to license their works for such uses would receive a distribution based on algorithms that would take various factors into account, including for instance, the number of works published, the type or length of those works, and possibly any available sales data (with criteria varying by industry). The CMO could also provide compensation to creators for uses of creative works that were created as works made for hire.

A certain amount would be set aside for those who have not yet registered but may do so later. The amount set aside would be calculated based on the estimated number of eligible creators and the number who have signed onto the license.

In 2011, the Copyright Office looked at the potential for ECLs for mass digitization and issued a Notice of Intent to obtain public comment on the proposal.[3] The Office concluded that it was premature to create ECLs in 2017, but the proposal nevertheless presents a carefully, well thought-out model for an ECL in the U.S. Today, the new generative AI technologies have created renewed interest in extended collective licensing, as the works owned by many individual creators are already being used with impunity to train generative AI to produce material that competes with human creation.

Legislative Request: Accordingly, we seek legislation to authorize creator organizations to provide ECLs on behalf of a particular class of creators for generative AI uses under an opt-out regime. Such an ECL could apply to past use only provided that the law is clear that permission need be obtained going forward.

2. Credit and Transparency

Legislative Request: We seek legislation that will require AI companies to keep records of what data, including what copyrighted works, they used to "train" their models and to publicly disclose those datasets and copyrighted works.

Record keeping alone, where the records are merely subject to discovery or subpoena, is not sufficient to allow the public to evaluate and researchers to ensure safety of the models. Requiring public disclosure will prevent use of sensitive, harmful, or illegally harvested data in the training. It will also further encourage AI developers to work with copyright owners to license works for AI uses, instead of relying on datasets created with pirated copies of the works, as has been done in some cases.

3. Permission and Payment for Use in Outputs

In addition to compensating creators for the use of their works in "training" AI, we seek to prevent AI companies from using creators' works in outputs without the creators' express permission. Where creators decide to permit this use, they should be compensated.

The CMOs (discussed above) could also license rights to allow AI to create derivative works or look-alikes/sound-alikes, and collect and distribute the fees on behalf of the individual creators

[3] https://www.copyright.gov/policy/massdigitization/

who wish to permit the use and be compensated, providing them with a means for earning additional income. This kind of licensing could be provided on a one-off basis (as many licensing organizations do today) or pursuant to blanket licenses as described above.

4. Labelling AI-generated Content

Legislative Request: We support legislation that requires labelling AI-generated works as such, with enforcement provisions that give it teeth, such as The AI Disclosure Act of 2023.

Such legislation would help protect consumers from being misled into purchasing or consuming AI-generated content that they assumed was human-created, and to otherwise identify when content has been generated by AI. It would also help reduce incentives to dump large quantities of low-quality AI-generated content into online and other marketplaces. In addition, it would protect consumers against fake text, imagery, and videos that are passed off as authentic news.

5. Permission for Generative AI's Use of a Person's Identity, Persona, or Style in a Federal Right of Publicity Law

Many generative AI systems can be prompted to produce outputs similar to other works or in the style of a certain author or artist or to allow a particular author's or artist's works to be incorporated into outputs. These outputs, while clearly taken from a particular human creator, may not rise to copyright infringement under current U.S. copyright law, which requires that the expression in an infringing work be "substantially similar" to that of the original work. When these outputs are sold in the marketplace in competition with an author's or artist's own work, however, they harm the market for the original work, impairing the copyright incentives as they are an uncompensated taking of the author's or artist's expression. Moreover they raise issues of authenticity and unfair competition. The right of publicity and unfair competition laws can assist in these cases but will not always apply to or redress this kind of unfair taking.

Legislative Request: Accordingly, we are seeking a new economic right, whether under copyright law, a federal right of publicity law, or as a *sui generis* right, to ensure that rightsholders retain control and can be compensated for AI outputs that copy recognizable style or are identifiably similar to or taken from a copyrighted work.

6. Prohibit Removal of Copyright Information in the Ingest/Training Process

When ingesting copyrighted works to train AI or to create datasets for training AI, information about work, author and owner is stripped out. This means that when an author or artist's work is incorporated in a generative AI output, they are not credited for the work, any more than they are paid for it, even when it is in the style of the artists or closely resembles their work. This is also unfair.

Proposal: We recommend amending section 1202 of the Copyright Act so that it is a violation to intentionally remove "copyright management information" from a copyrighted work without permission of the copyright owner, whether or not it can be proven that it was knowingly done to induce or enable infringement.

Section 1202 currently prohibits the removal or alteration of copyright management information (defined as information such as the title, author, owner, or terms of use for a work with which it is associated), but only if is done "knowing, or… having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement…" Because the AI developers who have used copyrighted works to train AI without authorization have generally claimed fair use, proving knowledge of infringement could be difficult. Even if the copyright owner ultimately establishes in court that the use was not a fair use, the developers will argue that they did not know at the time that the removal of metadata would induce infringement because they believed that the use was non-infringing.

Required Legislation: Section 1202(b) could be amended to delete the last phrase starting with "knowing, or… having reasonable grounds to know, that it will induce…"

Alternatively, a new section could be added that states:

"No person shall, without the authority of the copyright owner or the law, intentionally remove or alter any copyright management information in the course of using a work to train artificial intelligence."

7. No copyright protection for AI-generated outputs

We also continue to oppose efforts to expand copyright protection for AI-generated work, including through limited *sui generis* terms. AI systems do not need incentives to generate new works, nor are AI-generated works original in the sense of "original authorship" required under the Copyright Act. If AI-generated works were entitled to the same protection or similar as human-created works, it would incentivize the use of AI to generate content that mimics human-authored works in place of hiring human creators, and it would give AI outputs artificial leverage in the marketplace, inevitably crowding and diluting the marketplace to the point that copyright incentives no longer function as intended. Few human creators will be able to earn enough to sustain a profession, and the human quality of work produced by professionals—those who have talent and have trained in their careers for many years—will disappear.

Respectfully submitted,

The Authors Guild
American Photographic Artists
Artists Rights Society
American Society for Collective Rights Licensing
Dramatists Guild of America
Graphic Artists Guild
Novelists, Inc.
Romance Writers of America
Science Fiction & Fantasy Writers of America
Songwriters Guild of America
Sisters in Crime
Women's National Book Association