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LIBRARY OF CONGRESS  
Copyright Office Notice of Inquiry  
Docket No. 2023-6  
Federal Register 2023-18624

*Submitted via Regulations.gov*

## **REPLY COMMENTS OF ARTISTS RIGHTS SOCIETY, INC.**

Artists Rights Society (“ARS”) submits these reply comments in response to the U.S. Copyright Office’s notice of inquiry and request for comments on topics related to generative artificial intelligence (“AI”) and copyright. These comments are focused on the impact of AI on fine artists and the fine art licensing industry.

### **BACKGROUND**

ARS is the preeminent copyright management organization for fine artists in the United States and represents a worldwide collective of over 120,000 artists, including painters, sculptors and architects, such as Pablo Picasso, Henri Matisse, Marc Chagall, Joan Miro, Andy Warhol, Jackson Pollock, Georgia O’Keeffe, Frida Kahlo and Frank Stella.<sup>1</sup> ARS is a member of the International Confederation of Societies of Authors and Composers, or CISAC as it is more commonly known, along with 44 rights management “sister societies” in as many countries worldwide with which ARS has reciprocal agreements. Since its establishment 37 years ago, ARS has defended artists against copyright infringement, facilitated the licensing of their works, and has ensured that royalties are collected and remitted to artist members for the use of their works. ARS is proud to be part of a global effort to protect and promote artists’ rights.

AI is not new to ARS- in fact, a number of visual artists, including ARS members, responsibly incorporate AI into their practice.<sup>2</sup> ARS does not disagree that companies like OpenAI, Stability AI, and Midjourney (to name a few) represent exciting new opportunities for creative endeavors. Unfortunately, without securing the appropriate consent and according the appropriate credit and compensation, these companies are violating established copyright law and are taking advantage of the creators who generate the work on which they train their models.

Below, we’ll address some of the questions posed by the Copyright Office as well as some of the arguments made by those claiming that no infringing activity is taking place, that the infringing activity is permitted under the fair use doctrine, or that it’s too burdensome to obtain licenses from copyright owners for use in AI training.

### **INFRINGING ACTIVITY**

Here, we’re focused on the ingestion process, or how AI is trained, which generally addresses question 7.1. How does Dall-E (for example) know what the prompt “in the style of [a certain artist]” means, and produce an output that reasonably satisfies that prompt, without having trained the AI using the works of the artist named?

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<sup>1</sup> For more information about ARS, please visit <https://arsny.com/about/>.

<sup>2</sup> For example: Siebren Versteeg, David Salle.

AI developers and those arguing the ingestion of copyrighted material is either non-infringing or qualifies for a fair use defense claim that the process merely requires ingestion of data, or unprotectable facts and statistical patterns.

While AI may ultimately “learn” through data and patterns, that data still needs to be processed, frequently by human annotators, which necessitates the creation of a copy of protected work.<sup>3</sup> The Copyright Act states that a copy is made when a work is fixed “for a period of more than transitory duration,” allowing the copy to be “perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>4</sup> In the article referenced, The Verge reports that a “vast workforce” of people are tasked with sorting and tagging data from images, videos and other content scraped from the Internet.<sup>5</sup> For one human subject of the article, it took eight hours to review and tag a “several-second blip of footage.”<sup>6</sup> This tells us, along with other evidence, that the process of ingesting content for AI learning undoubtedly necessitates the creation of a copy of the works.<sup>7</sup> Absent a defense, this violates the exclusive copyrights of the owner.

## THE USE OF COPYRIGHTED CONTENT TO TRAIN AI MODELS IS NOT FAIR USE

The following addresses questions 8 and 8.5. When considering whether the ingestion of copyrighted material qualifies for the fair use defense to infringement, one uses the four factor test codified in section 107 of the Copyright Act.<sup>8</sup> The four factors are to be applied to the facts of the potentially infringing use at hand. While court decisions have expanded upon these four factors, it is worth emphasizing that the perceived or actual difficulty of securing a license is not a factor to be considered when determining whether an infringement qualifies as fair use.<sup>9</sup>

At this time in the comment and reply comment process, many entities with which we are aligned have put forth thorough analyses as to why a fair use defense does not apply.<sup>10</sup> Rather than reiterate the full analysis here, we’ll instead expand upon the fourth factor, which the court has found to be “undoubtedly the single most important element of fair use”<sup>11</sup> and one which ARS is uniquely positioned to comment upon, given our decades of licensing experience.

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<sup>3</sup> Josh Dzieza, *AI Is a Lot of Work*, The Verge (June 20, 2023). <https://www.theverge.com/features/23764584/ai-artificial-intelligence-data-notation-labor-scale-surge-remotasks-openai-chatbots>

<sup>4</sup> 17 U.S.C. § 101

<sup>5</sup> Dzieza, *AI Is a Lot of Work*

<sup>6</sup> *Ibid.*

<sup>7</sup> In an article in The Verge about Getty’s lawsuit against Stable Diffusion, the author writes, “evidence of Getty Image’s presence [in the Stable Diffusion dataset] can be seen in the AI software’s tendency to recreate the company’s watermark...” James Vincent, *Getty Images is suing the creators of AI art tool Stable Diffusion for scraping its content*, The Verge (January 17, 2023). <https://www.theverge.com/2023/1/17/23558516/ai-art-copyright-stable-diffusion-getty-images-lawsuit>

<sup>8</sup> 17 U.S.C. § 107; the four factors are: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount or substantiality of the portion used, and (4) the effect of the use on the potential market for or value of the work.

<sup>9</sup> The Copyright Office raises the matter of “obstacles” in question 9.3, and certain submitted comments discussed the difficulty of licensing when arguing that no license is required for the use of copyrighted materials to train AI.

<sup>10</sup> One prime example: The Copyright Alliance, a copy of which can be found at <https://arsny.com/wp-content/uploads/2023/11/Copyright-Alliance-Response-to-USCO-NOI-FINAL.pdf>.

<sup>11</sup> *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 566

Fourth factor analysis requires that we account for the actual and potential impact on the market for licensing one's copyright if the alleged infringer's actions are to go unchecked.<sup>12</sup> The consideration of the market for copyright licensing is to include established licensing markets, as well as markets that are reasonable or likely to be developed.<sup>13</sup>

In the US, in particular, where the law does not recognize resale royalties for works of fine art, copyright licensing is the only way an artist can generate revenue from a work of art once it is initially sold. It is indisputable that a copyright owner is entitled to demand payment, or a royalty, for licensing others the right to use their work.<sup>14</sup> Simply put, and as noted in the Supreme Court's recent decision in the *Warhol* case, "licenses... are how [creators...] make a living. They provide an economic incentive to create original works, which is the goal of copyright."<sup>15</sup>

The market for licensing copyrighted works is well-established and has been so for decades. ARS itself issues thousands of licenses per year. While ARS has not yet entered into an agreement specifically for the license of its members' works for training AI, there are examples of licenses secured and royalty payments established for the use of other media, such as photographs and writings for this same purpose. For example, Getty Images has partnered with NVIDIA to build an AI model trained on fully licensed content, with royalties paid to content creators,<sup>16</sup> and OpenAI has entered into an agreement with the Associated Press to license its archived news stories.<sup>17</sup> It follows that licensing for AI training is absolutely a reasonable and likely to be developed market for fine artists in light of the fourth fair use factor.

If AI companies are permitted to continue exploiting copyrighted work without a license (and absent a defense), it will destroy a burgeoning revenue stream for fine artists and will undermine the value of their works and copyright law generally. The ingestion of artwork to train AI is not and should not be considered a fair use.

## PROPOSED SOLUTION

Here, we generally address questions 9 through 9.2 and 10 through 10.5. The Copyright Office asks commenters to explore whether an opt-out approach or compulsory licensing regime is appropriate for licensing copyrighted work to train AI models. With respect to ARS's visual artists, foundations and estates, ARS supports securing licenses from copyright owners and generally rejects an opt-out approach or a compulsory license, where copyright owners are effectively stripped of control over their copyright. We support a voluntary collective licensing solution for our members who choose to participate in such a license.

Under the Copyright Act, a copyright owner must affirmatively consent to the use of their copyrighted work (absent a defense).<sup>18</sup> The copyright owner retains control by default. Thus,

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<sup>12</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994). The court found that the fourth fair use factor "requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market" for the original." citing *Nimmer* § 13.05[A][4], p. 13-102.61

<sup>13</sup> *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994)

<sup>14</sup> *Id.*

<sup>15</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 143 S. Ct. 1258 (2023)

<sup>16</sup> Rick Merritt, *Moving Pictures: NVIDIA, Getty Images Collaborate on Generative AI*, NVIDIA (March 21, 2023). <https://blogs.nvidia.com/blog/2023/03/21/generative-ai-getty-images/>.

<sup>17</sup> <https://apnews.com/article/openai-chatgpt-associated-press-ap-f86f84c5bcc2f3b98074b38521f5f75a>

<sup>18</sup> 17 U.S.C. § 106

requiring copyright owners to “opt out” of a use of their copyrighted work runs afoul of established law and would require the creation of an exception for AI training where no such exception is warranted or necessary. Making an exception would essentially reward AI companies for their infringements. Further, it is not known whether a data set can truly be “scrubbed” of certain intellectual property, which calls into question the efficacy of any proposed opt out approach.<sup>19</sup>

ARS’s primary purpose is to facilitate licenses on behalf of its members and has done so for 37 years. In that time, ARS has collected millions of dollars, some of which is the result of collective licenses with its foreign sister artists rights societies, and has successfully and seamlessly ensured the proper calculation and payment of royalties to its members.

ARS has the expertise and the infrastructure to secure fair agreements on behalf of its members, to enforce those agreements, to collect revenue, and to ensure that its members are paid their royalties due.

## **CONCLUSION**

Currently, AI models are trained using copyrighted materials in violation of the copyright owner’s exclusive rights. A fair use defense does not apply. Further, various creative classes are able and willing to discuss and administer licenses, which would benefit and compensate creators for the use of their works. It is our sincere hope that the Copyright Office continues to incentivize licensing, and therefore creativity, and requires affirmative licenses for the use of artists’ works for AI training.

Submitted by Samantha Moore, Director of Legal Affairs, on behalf of Artist Rights Society, Inc.

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<sup>19</sup> Stephen Pastis, *A.I.’s un-learning problem: Researchers say it’s virtually impossible to make an A.I. model ‘forget’ the things it learns from private user data*, Fortune (August 30, 2023). <https://fortune.com/europe/2023/08/30/researchers-impossible-remove-private-user-data-delete-trained-ai-models/>