

**Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

**In the Matter of Artificial Intelligence
and Copyright**

Docket No. USCO 2023-6

**Notice of Inquiry and Request for
Comments**

**REPLY COMMENTS OF THE
MOTION PICTURE ASSOCIATION, INC.**

I. Preliminary Comments

The Copyright Office received an enormous number of comments in response to its Notice of Inquiry¹ (“NOI”). The volume, breadth and substance of these comments reflect widespread agreement, across a broad and diverse set of stakeholders, that “generative AI,” as defined by the Office,² has and will continue to raise important questions under U.S. copyright law.

¹ Notice of Inquiry and Request for Comments on Artificial Intelligence and Copyright (Docket No. USCO 2023-6), 88 Fed. Reg. 59942 (Aug. 30, 2023).

² Other stakeholders joined MPA in commenting on the potential overbreadth and imprecision in the Office’s definition of “generative AI,” a concept that does not yet have a settled definition. *See* MPA at 2-3; Katherine Lee, A. Feder Cooper & James Grimmelman at 1, 3-4 (“‘[G]enerative AI’ . . . is a catch-all name for a massive ecosystem of loosely related technologies . . . [that] have different technical architectures and are trained on different kinds and sources of data using different algorithms”; “[t]hese systems behave differently and raise different legal issues.”); Peermusic and Boomy at 7 (“At the outset we believe it is important to acknowledge that there is no industry-standard definition of artificial intelligence. While we appreciate the Office’s glossary of key terms in the AI NOI, the closer we examine the definitions, the less confident we become in our ability to apply them in practice, if we or our songwriters were to be required to do so with respect to every musical work we register.”). MPA believes it is more important to focus on the facts of particular technological systems within the

The President’s October 30, 2023 Executive Order underscores the importance of these issues and the Copyright Office’s central role in guiding policy around this topic.³ The Executive Order notes the pending Office study and directs the United States Patent and Trademark Office (“USPTO”) to consult with the Office in order to “issue recommendations to the President on potential executive actions relating to copyright and AI . . . including the scope of protection for works produced using AI and the treatment of copyrighted works in AI training.”⁴

In its Initial Comments, the Motion Picture Association, Inc. (“MPA”) provided responses to the Office’s questions based on its members’ unique perspective among the many parties who submitted comments. MPA’s members are creators and owners of a large repertoire of enormously popular copyrighted works; they also are technological innovators and consumers that use AI as a tool to support and enhance the creative processes of the many thousands of people who create motion picture and television content. MPA’s Initial Comments reflected a balancing of the interests at stake in addressing the important questions the Office asked.

MPA brings that same balanced approach to these Reply Comments, which will be brief. MPA’s Reply Comments focus on a few areas of general consensus: legislation to change copyright law to create specific “AI exceptions” appears unnecessary at this time,⁵ and most

context of the questions courts and policymakers may have to answer when presented with questions of copyright law in the broad field of AI technologies.

³ Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, Exec. Order No. 14110, 88 Fed. Reg. 75191, 2023 WL 7160446 (Pres.), (Oct. 30, 2023) (the “Executive Order”), <http://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence>.

⁴ Executive Order § 5.2(c)(iii).

⁵ See *infra* Section II replying to comments responding to Question 4 (international consistency), Question 5 (new legislation), Question 15 (transparency and disclosure), Question 28 (labeling), and Question 32 (protection for style).

stakeholders agree that human authors use AI as a tool to create copyrightable works.⁶ MPA also believes it is important to respond to some comments that, in MPA’s view, do not reflect a correct understanding of U.S. copyright law,⁷ or proposals that have the potential to conflict with the First Amendment if not judiciously implemented.⁸ These include certain areas specifically addressed by the President’s Executive Order. MPA encourages the Copyright Office to consider these issues with the same deliberate and measured approach, and to ensure that the Office’s recommendations account for the vital contributions that the creators of original expression make to the American economy, society and culture.

II. Commentors Largely Agreed That New Copyright Legislation Is Not Necessary at This Time. While Some Commentors Asked for Special Exceptions or Regulations, the Copyright Office Should Carefully Scrutinize Such Proposals.⁹

The great weight of stakeholders’ opening comments agreed with MPA that specific “AI exceptions” to copyright law are not necessary at the present time. Some commentors, however, did advocate for policy changes that have the potential to negatively impact copyright owners. MPA believes the Copyright Office should carefully scrutinize such proposals. These include (1) calls for U.S. copyright law to effectively mimic “text and data mining” (“TDM”) exceptions in other jurisdictions; (2) proposals for recordkeeping and disclosure requirements that, if implemented too broadly, would needlessly burden the creative industries; (3) proposals for labeling AI-generated material that have the potential to negatively impact the creative industries

⁶ See *infra* Section IV replying to comments responding to Question 18 (copyrightability).

⁷ See *infra* Section III replying to comments responding to Question 8 (fair use).

⁸ See *infra* Section V replying to comments responding to Question 31 (federal right of publicity).

⁹ This section addresses some of the policy proposals recommended in response to Question 4 (international consistency), Question 5 (new legislation), Question 15 (transparency and disclosure), Question 28 (labeling), and Question 32 (protection for style).

and their copyrighted works; and (4) proposals to recognize copyright protection for style. MPA responds briefly to each proposal (or set of proposals) below.

1. TDM exceptions. Several commentators urged—under the guise of “consistency” or “harmony” with other nations’ laws—that the U.S. copyright law should include broad TDM exceptions.¹⁰ In fact, only a small minority of countries have adopted TDM exceptions to their copyright laws and some are rethinking that decision. The U.K., for example, is reconsidering the scope of its TDM exception in part because “the exception would result in no economic reward for artists where their works are used for commercial gain by AI companies.”¹¹ Internationally, many countries have decided *not* to create an “AI exception” to copyright protection. As discussed further in Section III, MPA strongly believes calls for such bright line rules should be rejected.

Given that AI training occurs in varied circumstances and for a variety of purposes, in the U.S., the case-specific fair use framework is most appropriate for addressing whether training AI models using copyrighted works constitutes infringement—not a bright-line rule in the form of a

¹⁰ See, e.g., Anthropic PBC at 4-5 (arguing for “consistency” with the approaches taken in Japan and Singapore that have “specific exceptions that explicitly permit text and data mining uses”); Computer & Communications Industry Association (“CCIA”) at 4-5 (declining to expressly advocate for an exemption, but noting that “an AI-specific exception for training without compensation could provide additional certainty to AI system developers”); Wikimedia Foundation at 5 (citation omitted) (“[W]e encourage regulators and legislators to align their approaches with existing models, such as the European Union’s inclusion of an exemption for text and data mining in the Directive on Copyright in the Digital Single Market, that enable public interest research and other beneficial uses of protected works.”); U.C. Berkeley, University Library (“U.C. Berkeley Library”) at 4 (citation omitted) (noting that the University “continues to advocate for harmonization in TDM legal protections worldwide”); Stability AI at 8 (“[W]e encourage thoughtful international harmonization across borders on matters such as fair use or text and data mining.”).

¹¹ Robert Dickens, *UK re-considers proposed exception for text and data mining*, ALLEN & OVERY (Mar. 2, 2023), <https://www.allenoverly.com/en-gb/global/blogs/data-hub/uk-re-considers-proposed-exception-for-text-and-data-mining>.

catchall TDM exception. The fair use framework has long been a hallmark of U.S. copyright law, and it codifies “an equitable rule of reason” under which “each case raising the question must be decided on its own facts.”¹² For over a century, both copyright owners and the users of copyright-protected works have understood that a party seeking to exercise the exclusive rights of a copyright owner without their permission would have the burden to establish that use is justified under fair use, balancing the copyright rights of creators with the First Amendment rights of third parties where the particular facts show that doing so is “necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts’”¹³ TDM exceptions would jettison that well-established framework.

TDM exceptions are also not beneficial as a policy matter. Although commentators advocating for changes in U.S. policy contend that text and data mining benefits AI,¹⁴ they are essentially asking the Copyright Office and Congress to pick winners and losers by effectively requiring content creators to subsidize AI development—which often has a commercial goal and financial backing—through uncompensated use of their works. MPA believes broad TDM

¹² *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (quoting H. R. Rep. No. 94-1476, at 65 (1976)).

¹³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. Const., Art. 1, § 8, cl. 8); see MPA at 15-26.

¹⁴ See U.C. Berkeley Library at 2 (“Text and data mining allows researchers to identify and analyze patterns, trends, and relationships across volumes of data that would otherwise be impossible to sift through.”); Stability AI at 8 (“The cumulative effect of these [text and data mining] reforms is to promote access to large and diverse datasets, helping to make AI safer, more effective, and less biased.”); see also Anthropic at 5 (arguing that “harmony and interoperability of copyright approaches among major economies will enable model developers to offer products and services across multiple countries”); Wikimedia at 5 (citation omitted) (“[W]e encourage regulators and legislators to align their approaches with existing models, such as the European Union’s inclusion of an exemption for text and data mining in the Directive on Copyright in the Digital Single Market, that enable public interest research and other beneficial uses of protected works.”).

exceptions would undermine, rather than support, innovation and creativity. Exceptions that disregard important rights of copyright owners undermine the substantial artistic, innovative, and economic contribution of creative industries—that amount to trillions in GDP and millions of jobs each year.¹⁵

2. Recordkeeping and disclosure requirements. Some commentators support legislation requiring developers of AI models and creators of training datasets to disclose the works that they use for training.¹⁶ For example, a commentator advocated for a law, similar to 17 U.S.C. § 512(h), creating a “new administrative subpoena process” that would require AI developers to keep records, which may be subject to subpoena by copyright owners.¹⁷ Another commentator advocated for legislation requiring AI companies to retain records of the works they used to train their models and to publicly disclose that information.¹⁸ Importantly, these proposals are focused on AI companies that are offering AI systems and services to the public.

¹⁵ In 2019, copyright-intensive industries added \$1.3 trillion to the U.S. economy and directly employed over 6.6 million workers. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2022 Review of Notorious Markets for Counterfeiting and Piracy at 5 (Jan. 31, 2023).

¹⁶ *See, e.g.*, The Authors Guild at 29 (“AI companies should be required to make publicly available or provide access to a complete list of all copyrighted works used in the training datasets, including the URL from where the data was obtained, and any copyright management information”); The Recording Academy at 9 (“Yes, the Academy believes that both AI model developers and the creators of training datasets should be required to collect, retain, and disclose records of their training models.”).

¹⁷ *See* The American Association of Independent Music and Recording Industry Association of Music (“A2IM/RIAA”) at 11, 31, Annex B (“Congress should consider creating a new administrative subpoena process, loosely modeled after the Section 512(h) subpoena process, whereby a copyright owner or a person authorized to act on the owner’s behalf may, by asserting a subjective good faith belief that one or more of the owner’s copyrighted works have been used by an AI developer without authorization, request the clerk of the United States district court to issue a subpoena to an AI developer for identification of any of the copyrighted works that have been reproduced in the training of an AI model.”).

¹⁸ National Music Publishers’ Association (“NMPA”) at 25-28 (“To ensure that rightsholders are not deprived of their remedies and AI model developers cannot evade accountability by

MPA understands the importance of copyright owners being able to have the ability to learn when their works have been copied en masse. MPA does not oppose such efforts, but it strongly believes that the Copyright Office should highlight that any such recordkeeping and disclosure requirements should apply only to those companies offering public-facing AI systems and services trained on unlicensed third-party material, as legislation in this area must be carefully tailored to avoid overbroad application. For example, where content creators use AI tools developed through the use of their own content (or content licensed from another), a requirement to track and disclose the materials used for such purposes not only provides no benefit, but it could impose significant burdens.

3. Labeling requirements. The Copyright Office’s NOI asked a general question: “Should the law require AI-generated material to be labeled or otherwise publicly identified as being generated by AI? If so, in what context should the requirement apply and how should it work?” Many commentators responding to the Copyright Office’s NOI supported labeling requirements *for AI developers*, i.e., providers offering AI services or systems to the public.¹⁹

destroying the evidence, developers of AI models must be required to collect and retain complete and detailed records of the contents of datasets collected and/or used to train AI models.”); *see* Getty Images at 23-24 (“Developers of AI Models and creators of training datasets should be required to collect, retain and disclose auditable records regarding the sources of materials used to train AI Models.”); *see also* The Authors Guild at 29 (“We believe that commercial AI developers who make generative AI models commercially available should be required to disclose the dataset and/or works used to train their models. . . . We don’t think it is necessary to impose similar obligations on creators of training datasets as long as there are robust requirements on the AI developers to ensure that the content in the datasets, they are using is ascertainable and does not violate copyright, privacy, and other laws.”).

¹⁹ NMPA at 33 (“With regard to labeling, output generated using AI should identify, in its metadata, the AI system used to generate it, the developer of that system, the models used by the system and the datasets the model was trained on.”); The Authors Guild at 37-38 (supporting legislation that requires labeling AI-generated works and related enforcement provisions, such as The AI Disclosure Act of 2023, H.R. 3831); Getty Images at 25-27 (laying out potential labeling and identification requirements and noting inadequacies of current technology solutions);

MPA wants to ensure the Copyright Office is attentive to this distinction. Labeling may be appropriate for the outputs of public-facing AI systems and services to the public, but not for those (like MPA’s members) who use AI systems or services as a tool in the creative process for non-deceptive, low-risk purposes, such as the creation of fictional entertainment or other expressive works.

Requiring those who use AI systems for expressive rather than deceptive purposes to label their works would also likely not pass constitutional muster. Labeling requirements for the motion picture industry would implicate the First Amendment’s prohibition on compelled speech, which requires such requirements to be narrowly tailored to further a sufficiently compelling governmental interest, such as avoiding deception.²⁰ Because strict scrutiny applies under those circumstances, courts have routinely struck down laws requiring speakers to include certain matters within their protected speech, thus preventing the speakers from expressing the message they wish to convey.²¹ Requiring “labels” for expressive content like motion pictures

Copyright Clearance Center, Inc. (“CCC”) at 18 (hyperlink omitted) (“Wholly AI-generated material should be labeled or otherwise publicly identified as being generated by AI. Research suggests that as more content is machine generated, it will be critical for artificial intelligence (AI) developers to distinguish it from human-created content to ensure the continued development of quality AI.”).

²⁰ MPA at 67-68 (response to Question 28).

²¹ Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 361-62 (2018); *see, e.g., id.* (collecting cases); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557, 572 (1995) (law requiring parade organizers to include certain floats unconstitutional); *Riley v. Nat’l Fed’n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 798-99 (1988) (law requiring professional fundraisers to make certain disclosures unconstitutional); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974) (law compelling newspaper to print an editorial reply “exact[s] a penalty on the basis of the content of a newspaper” and is unconstitutional); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (law prohibiting distribution of anonymous campaign literature that does not contain the identity of the individual issuing the literature unconstitutional); *Forsyth v. Motion Picture Ass’n of Am., Inc.*, No. 16-cv-935, 2016 WL 6650059 at *3-4 (N.D. Cal. Nov. 10, 2016) (holding that MPA had First Amendment right not to include the plaintiff’s preferred ratings on films that depicted smoking).

would interfere with MPA members’ creative process, is unnecessary to accomplish any policy goal (e.g., avoiding deception), and would impose undue burdens on creators and creative industries.

As labeling of AI-generated material raises calls for policy changes, the conversation may benefit from the Copyright Office’s perspective based on this NOI. In particular, the President’s Executive Order calls for the Secretary of Commerce to work with “heads of other relevant agencies” to draft a report regarding recommendations on potential policies related to labeling AI-generated material.²² MPA urges the Office to ensure that proposals regarding labeling focus on the policy goal of avoiding viewer deception in high-risk circumstances and avoid unintended consequences for creators and creative industries.

4. Copyright protection for style.²³ Some commentators advocated for amendments to the Copyright Act to protect artistic style.²⁴ As discussed further *infra* Section V, MPA is sensitive to many of the concerns that underpin these proposals; nevertheless, attempting to address those concerns through copyright law would raise serious jurisprudential and policy concerns.²⁵

Specifically, as MPA explained in response to Question 32 in its Initial Comments, changing copyright law to protect style would alter copyright’s fundamental distinction between

²² Executive Order § 4.5 (a)(i)-(vi).

²³ Proposals to protect style as expression under copyright law are distinct from those proposals for certain, limited, policies to address unauthorized “digital replicas.” The latter proposals do not necessarily implicate copyright law, although they do implicate the First Amendment. As discussed *infra* Section V, MPA agrees that narrowly tailored legislation in this space may be appropriate.

²⁴ The Authors Guild at 36 (advocating for Congress to “adopt 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.”).

²⁵ See MPA at 74-77 (discussing the legal and policy issues regarding protecting style).

protectable expression and unprotectable ideas. Changing the copyright law to give parties exclusive rights over a particular style muddies the idea/expression dichotomy.²⁶ Courts have consistently rejected arguments that copyright law should protect a creator’s style.²⁷ Setting aside the question of whether other areas of the law may already apply to address these questions, such a dramatic change in copyright law may hurt creators and undercut artistic freedom and free speech. For example, creators could face intractable legal action for imitation of what may ultimately be a very amorphous concept of style untethered from actual expression.²⁸ The Copyright Office should emphasize the potential downsides and recommend against any proposed changes to the Copyright Act to accommodate concerns for artistic style.

III. Training AI Models or Use of AI Models Without Authorization May Constitute Infringement; Whether Such Training Constitutes Fair Use Is Fact Dependent.²⁹

The comments reflect a fierce debate about whether the mass copying of copyrighted works to train AI models constitutes copyright infringement or fair use. MPA believes the fact-intensive nature of fair use means that it cannot be definitively analyzed outside of the context of the facts of a particular case, including the broad and varied facts that may apply to training of AI models. Although certain sets of facts (like for-profit versus non-profit use) may make fair

²⁶ See 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

²⁷ 2 Patry on Copyright § 4:14 (2023) (collecting cases).

²⁸ See *id.* (“If an author or artist claimed broad protection for a style not associated with a particular work and fixation, it would be difficult, if not impossible, to determine the scope of protection. . . . Determining substantial similarity between plaintiff’s and defendant’s ‘works’ would be skewed since plaintiff would not be asserting copyright in a work, but rather in an amorphous style that exists independent of any particular work.”); see also *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997).

²⁹ This section addresses some of the misstatements and misleading arguments in response to Question 8 (fair use) and Questions 22-25 (infringement).

use more or less likely, it is not possible or appropriate *ex ante* to establish broad, categorical rules.³⁰

Unfortunately, a number of commentators advocated for rules (or claimed that some rules already exist) that fundamentally misunderstand copyright law and undermine its purposes. MPA believes it is appropriate for the Office’s forthcoming report to correct recurring false statements by some commentators: (1) that mass copying to train AI models does not implicate the exclusive right of reproduction; (2) that the fair use defense should apply *per se* to mass copying for training purposes; (3) that copyright law embraces several doctrines that in fact have no grounding in law, such as “non-expressive copying”; and (4) that only the users of the completed AI systems, and not the AI developers themselves, may be liable. MPA addresses each of these issues in turn.

A. Parties who copy to train AI models implicate the exclusive reproduction right.

Based on the available reports, the process of compiling datasets for training AI models and the process of “ingesting” those works involves making a copy, i.e., an exercise of the reproduction right.³¹ Some commentators nevertheless dispute this point, or evade it with phrasing that sidesteps the fact of copying. For example, Stability AI suggests that there is no infringement because “[m]odels learn behaviors, they do not store works. Through training, these models develop an understanding of the relationship between words, concepts, and

³⁰ MPA at 15-26 (responding to Questions 8 to 8.4).

³¹ The copyright owner has the exclusive right “to reproduce the copyrighted work in copies,” where copies are defined as “material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. §§ 101, 106(1).

fundamental visual, textual, or musical features.”³² OpenAI describes the training process as “showing the model a wide range of text” and then claims “[m]uch like a person who has read a book and sets it down, our models do not have access to training information after they have learned from it.”³³ The relevant question under 17 U.S.C. § 106(1), however, is whether a secondary user “reproduces the copyrighted work in copies,”—not whether the user “stores” or “reads” the copy.³⁴

The Office should make clear that these euphemisms cannot change or obscure what happens when an AI developer trains a model through copying other parties’ works.³⁵ The USPTO recognized in its Report that the process of training generative AI models “will almost by definition involve the reproduction of entire works or substantial portions thereof.”³⁶ As a result, “whether this constitutes copyright infringement will generally be determined by considering the applicability of the fair use doctrine, an exception set forth in § 107 of the Copyright Act, 17 U.S.C. § 107.”³⁷ As Professor Opderbeck explained, “[t]here is no doubt that a reproduction is made of AI training data until the machine incorporates that data into its algorithmic functions” because “the original [work] *is* reproduced at least temporarily to generate the mathematical representations.”³⁸

³² Stability AI at 13.

³³ OpenAI at 5-6.

³⁴ 17 U.S.C. § 106(1).

³⁵ *Cf.* The Copyright Alliance Reply at Section II.4 (debunking AI companies’ attempts to anthropomorphize AI systems and assumption that humans and AI learn in the same ways).

³⁶ U.S. Patent & Trademark Office, *Public Views on Artificial Intelligence and Intellectual Property Policy* at 24 (Oct. 2020), https://www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pdf (last visited Nov. 15, 2023).

³⁷ *Id.*

³⁸ David Opderbeck at 3, 9 (citation omitted).

Other comments by AI developers appeared to acknowledge that training AI models involves the exercise of the reproduction right. For example, Google commented:

If training could be accomplished without the creation of copies, there would be no copyright questions here. Indeed that act of “knowledge harvesting,” to use the Court’s metaphor from *Harper & Row*, like the act of reading a book and learning the facts and ideas within it, would not only be non-infringing, it would further the very purpose of copyright law. The mere fact that, as a technological matter, copies need to be made to extract those ideas and facts from copyrighted works should not alter that result.³⁹

Anthropic’s comments were similar: “For Claude, . . . the training process makes copies of information for the purposes of performing a statistical analysis of the data.”⁴⁰

The Office’s report should expressly reject efforts to dispute the fact that copies are made when AI models train on copyrighted works, i.e., implicate the reproduction right.⁴¹

B. The Copyright Office should resist calls for bright-line rules for fair use.

Because parties who copy works to train AI models exercise the copyright owner’s exclusive reproduction right, those parties are liable for infringement unless they can meet their burden of proving that an affirmative defense applies. The fair use affirmative defense requires “a case-by-case determination”⁴² where courts must consider the four, non-exclusive statutory factors and “weigh[] [them] together, in light of the purposes of copyright,” a task that “is not to be simplified with bright-line rules.”⁴³ At a baseline, therefore, any advocacy for bright-line

³⁹ Google at 9 (emphasis added) (citing *Harper & Row*, 471 U.S. at 545).

⁴⁰ Anthropic at 7.

⁴¹ Notably, to avoid these specious arguments gaining any traction in the courts, Universal Music Group (“UMG”) “proposes an amendment to Section 106 of the Copyright Act that clarifies that the use of copyrighted works for training of generative AI is an exclusive right of the copyright owner.” UMG at 21.

⁴² *Harper & Row*, 471 U.S. at 549.

⁴³ *Campbell*, 510 U.S. at 577-78 (citation omitted).

rules excusing the use of copyrighted works for purposes of AI training is irreconcilable with binding Supreme Court precedent on fair use.

The Copyright Office should resist calls to depart dramatically from the law in favor of a “per se rule.” For example, stakeholders such as technology companies brazenly urged that “the Office’s report should draw a bright line stating that uses of copyrighted materials as data in the creation and deployment of AI machine learning systems are fair uses.”⁴⁴ Many of the arguments these stakeholders press are not focused on the four-factor analysis of fair use; rather, they are policy arguments for legislative change in disguise. Such a rule would be antithetical to copyright law and the fair use approach in the United States.⁴⁵

As another example, venture capital firm Andreessen Horwitz argued that using copyrighted content to train AI models must be deemed fair use because it and other private firms have invested “billions and billions of dollars—in the development of AI technologies, premised on an understanding that, under copyright law, any copying necessary to extract statistical facts is permitted,” thereby rendering any attempts to undermine these investment expectations a “national security” risk and threat to competition in innovation.⁴⁶ As part of the

⁴⁴ CCIA at 7-8 (“To help prevent this issue [whether training is fair use] from being relitigated in every case involving an AI training database, the Office’s report should draw a bright line stating that uses of copyrighted materials as data in the creation and deployment of AI machine learning systems are fair uses. Such clear guidance not only would conserve judicial resources, it would prevent erroneous decisions. This bright line would benefit innovators, courts, and the public.”); *see Adobe, Inc. at 3* (citing *Sega v. Accolade*, 977 F.2d 1510 (9th Cir. 1992)) (“Fair use precedent dealing with ‘significant changes in technology’ make clear that use of copyrighted works for purposes like training AI models is transformative.”); Anthropic at 9 (“Because training LLMs is a fair use, we do not believe that licensing is necessary per se.”); Meta at 11 (arguing that “model training is squarely protected by the fair use doctrine”).

⁴⁵ *See supra* n.10 (citing comments that articulated no change in legislation was necessary, but advocating that the Copyright Office should make clear any ruling on fair use would be consistent with the extreme TDM exceptions in countries like Japan and Singapore).

⁴⁶ Andreessen Horwitz (a16z) at 5-6.

venture capital firm’s appeal to its extreme positions, it mentioned that “AI offers us the opportunity to improve the lives of everyone in a way that few other technologies—and maybe no other technologies—ever have. The Office can play a part in bringing about that result not by constraining AI but by embracing it wholeheartedly.”⁴⁷

That statement is hyperbolic, and MPA disagrees that the Copyright Office’s role is to “wholeheartedly” “embrac[e]” any particular technology. Rather, the Office should strive to adopt technologically neutral standards that are faithful to copyright law and principles. Although it may be true that AI technologies could have great societal benefits (e.g., in the areas of medicine and national security), that does not mean unlicensed training on works like motion pictures and T.V. shows is necessary for AI technologies to achieve those benefits. Nor does it mean that, when particular instances of AI training are analyzed through the lens of the four-factor fair use analysis, that those uses will always (or never) be able to satisfy that test. Moreover, that venture capital firms invested “billions and billions of dollars” in AI technology should not give these companies carte blanche to exploit copyrighted works—the same works that copyright owners also invested “billions and billions of dollars” in and that creators worked tirelessly to produce.

There are many other reasons why Andreessen Horwitz’s arguments are simply not sensible. Their economic argument is reminiscent to the respondents’ position in *Grokster*, which Justice Kennedy sharply criticized at oral argument: “[W]hat you want to do is to say that unlawfully expropriated property can be used by the owner of the instrumentality as part of the startup capital for his product. . . . just from an economic standpoint and a legal standpoint, that

⁴⁷ *Id.* at 5-6 (emphasis omitted).

sounds wrong to me.”⁴⁸ And as stated by a former employee of an AI developer, who now disagrees with his former employer’s aggressive argument to this Office that training AI models is categorically fair use: “Companies worth billions of dollars are, without permission, training generative AI models on creators’ works, which are then being used to create new content that in many cases can compete with the original works.”⁴⁹

Any AI developer that wishes copyright certainty is of course free to license copyrighted works it wishes to use for training.⁵⁰ Licensing is not only to avoid a claim of infringement; it would also presumably improve AI outputs, since the licensed inputs will probably be of higher quality and better tailored to the purpose of the AI tool.

Likewise, non-profit academic research institutions like U.C. Berkeley’s University Library asserted that “training of AI LLMs by using copyright-protected inputs falls squarely within what courts have determined to be a transformative fair use, especially when that training is for nonprofit educational or research purposes.”⁵¹ As MPA explained in response to Question 8.3 in its Initial Comments, although the fact that a use is for non-commercial purposes tends to weigh in favor of fair use, for-profit and non-profit labels are not dispositive.⁵²

⁴⁸ Transcript of Oral Argument at 36:5-36:12 of *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480) (Kennedy, J.), *transcript available at* <https://www.supremecourt.gov/pdfs/transcripts/2004/04-480.pdf>.

⁴⁹ Music Business Worldwide, *Why I Just Resigned From My Job in Generative AI* (Nov. 15, 2023), <https://www.musicbusinessworldwide.com/why-just-resigned-from-my-job-generative-ai>.

⁵⁰ See MPA at 28-30.

⁵¹ U.C. Berkeley Library at 5 (emphasis and citation omitted); *see id.* at 1, 4-8.

⁵² *Harper & Row*, 471 U.S. at 562 (“The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”); *see, e.g., Hachette Book Grp., Inc. v. Internet Archive*, No. 20-cv-4160, 2023 WL 2623787, at *9 (S.D.N.Y. Mar. 24, 2023) (holding that “[t]he commercial-noncommercial distinction . . .

Some commentators took the contrary position—that training AI using copyrighted works is essentially never fair use. In MPA’s view, any attempts to distill the fair use analysis into bright-line rules ignores the wide variations among different AI systems and implementations, as well as the Supreme Court’s clear instruction that “bright lines” are simply not appropriate in this context.⁵³

C. No such doctrine as “non-expressive copying” exists; fair use law should be applied (not expanded) in cases involving AI training.

Some commentators argue that their “AI training is always fair use” position is justified by certain “doctrines” that these commentators have pulled from a cherry-picked set of cases; but those “doctrines” have not been endorsed by any court and do not represent the full breadth of fair use cases in these areas.⁵⁴ The Office should not lend credibility to these positions by articulating them in its forthcoming report without clarification that such terms are *not* judicially embraced legal doctrine.

counsels against a finding of fair use” because the defendant “stands to profit from its non-transformative exploitation of the Works in Suit”).

⁵³ *Cf. Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc.*, No. 20-cv-613, 2023 WL 6210901, at *7-11 (D. Del. Sept. 25, 2023) (holding that a jury must determine whether it is fair use for a technology company to copy summaries from Westlaw to train its AI).

⁵⁴ While advocates for AI companies cite such cases where courts have accepted fair use defenses, such as *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (finding fair use in search engine case); *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (same), *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522-23 (9th Cir. 1992) (“*Sega*”) (reverse engineering); other courts have rejected the defense in similar contexts, *Fox News Network v. TVEyes*, 883 F.3d 169 (2d Cir. 2018) (search engine not fair use), *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013) (search engine not fair use), *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832 (Fed. Cir. 1992) (reverse engineering not fair use). Consistent with fair use’s case-by-case approach, it is typically not possible to summarize the law with doctrinal categories.

For example, some stakeholders argued that their training process constituted “non-exploitative use” of copyrighted works.⁵⁵ Professors Pamela Samuelson, Christopher Jon Sprigman, and Matthew Sag, as well as many technology companies, asserted that training AI models using copyrighted works should be considered fair use because the training itself is a “non-expressive use.”⁵⁶ They assert:

[J]ust like text data mining and other *non-expressive uses*, that copying typically does not implicate the copyright owner’s interest in controlling the communication of their original expression to the public because the copying is simply the first step in an analytical process that typically yields abstract metadata that is then used to create new digital artifacts that are not substantially similar to any of the particular works in the training data.⁵⁷

Not only are none of these phrases judicially recognized doctrines, they distort the fair use factors.⁵⁸ The relevant inquiry is not whether the “use” is “expressive” or “non-expressive”; rather, it asks whether the “use” is transformative, as one consideration in the four-factor analysis. Indeed, the USPTO’s report on AI was clear that “[c]opying substantial portions of

⁵⁵ Meta at 11 (“The American AI industry is built in part on the understanding that the Copyright Act does not proscribe the use of copyrighted material to train Generative AI models. That understanding flows directly from the fact that model training is a quintessentially non-exploitive use of training material. As explained above, the purpose and effect of training is not to extract or reproduce the protectable expression in training data, but rather to identify language *patterns* across a broad body of content.”); Andreessen Horwitz (a16z) at 6 (arguing that “generative AI model training is a productive, non-exploitive use of training material. That type of use does not exploit any protectable expression in any given work, and so it does not implicate any of the legitimate rightsholder interests that copyright law seeks to protect. It is for that reason that model training falls squarely under the fair use doctrine[.]”).

⁵⁶ Pamela Samuelson, Christopher Jon Sprigman & Matthew Sag at 11-25.

⁵⁷ *Id.* at 7 (emphasis added).

⁵⁸ See Copyright Alliance Reply at Section I.3 (discussing, in detail, the flaws of commentators’ “non-expressive use” arguments).

expressive (copyrighted) works, *even for non-expressive purposes* implicates the reproduction right and, absent an applicable exception, is an act of copyright infringement.”⁵⁹

The stakeholders embracing these so-called “doctrines” cite cases like *Google Books* and *HathiTrust*. But none of those cases embraced “non-expressive use” or any similar concept as a doctrine. The uses in those cases were determined fair only *after* a case-specific application of the fair use factors. As MPA pointed out in its Initial Comments, some cases rejected the fair use affirmative defense, even when the copies were used to create allegedly non-infringing works.⁶⁰

Professor Opderbeck’s detailed submission walked through and distinguished cases like *Google Books* and *HathiTrust*, correctly noting that the Second Circuit’s focus in those decisions “was on the market for the copyrighted work, not on the degree of expression in the allegedly infringing use.”⁶¹ That the court “credited Google’s and Hathi Trust’s *factual* arguments that search snippets enabled by full-text scans would not erode the market for complete published books . . . is not any kind of doctrinal conclusion about other kinds of ‘bulk non-expressive uses,’ much less about AI or robot uses.”⁶² In the end, Professor Opderbeck concluded that “the cases focus on specific uses and markets and do not announce a generally applicable rule of non-expressive fair use.”⁶³ And as MPA explained in response to Question 8 in its Initial Comments,

⁵⁹ U.S. Patent & Trademark Office, *Public Views on Artificial Intelligence and Intellectual Property Policy* at 23 (emphasis added).

⁶⁰ MPA at 18 (citing *Video Pipeline, Inc. v. Buena Vista Home Ent., Inc.*, 342 F.3d 191 (3d Cir. 2003) (reproductions for two-minute clips not fair use); *Princeton Univ. Press v. Michigan Document Serv., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (commercial copies no fair use when end user was student); *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014) (same).

⁶¹ David Opderbeck at 17-18 (citation omitted).

⁶² *Id.* at 18-19.

⁶³ *Id.* at 17-20.

even in cases involving the mass digitization of books and other copyrighted works within the Second Circuit, different panels and district courts have reached different conclusions.⁶⁴

Likewise, some commentators labeled AI training as “intermediate copying to extract non-copyrightable elements like facts and data.”⁶⁵ These stakeholders rely on cases like *Sega*, 977 F.2d at 1522-23. Those cases are inapposite. In *Sega*, the Ninth Circuit pointed out that § 106(1) “unambiguously encompasses and proscribes ‘intermediate copying.’”⁶⁶ Although the courts in those cases ultimately found fair use, the fact that the copying was somehow “intermediate” did not change the analysis.⁶⁷ Rather, *Sega* involved computer code works, where—unlike works where the “unprotected aspects of most functional works are readily accessible to the human eye”—the copying required “provides the only means of access to those elements of the code that are not protected by copyright.”⁶⁸ Such circumstances simply do not apply to visual, literary, and motion picture works. None of the cases cited by AI developers involve the

⁶⁴ Compare *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (finding fair use); *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (same), with *TVEyes*, 883 F.3d 169 (finding no fair use); *Hachette Book Grp.*, 2023 WL 2623787, at *7 (same).

⁶⁵ Anthropic at 7; Meta at 13.

⁶⁶ *Sega*, 977 F.2d at 1518; see *id.* (citing *Walker v. University Books*, 602 F.2d 859, 864 (9th Cir. 1979) (“[T]he fact that an allegedly infringing copy of a protected work may itself be only an inchoate representation of some final product to be marketed commercially does not in itself negate the possibility of infringement.”)).

⁶⁷ Copyright Alliance at 54-57 (distinguishing cases purporting to show that AI ingestion qualifies as fair use); Copyright Alliance Reply at Sections I.2, I.3 (same); cf. *Sega*, 977 F.2d at 1518-27 (“[I]ntermediate copying of computer object code may infringe the exclusive rights granted to the copyright owner in section 106 of the Copyright Act regardless of whether the end product of the copying also infringes those rights.”).

⁶⁸ *Id.* at 1518, 1525.

wholesale copying of expressive, non-functional works and the creation of a model that is then used to generate expressive works.⁶⁹

D. AI developers can be held liable for infringement.

Both direct and secondary infringement doctrines may be relevant to cases involving generative AI models. AI developers and the venture capital firms that support them argue only end users, not the creators of the technology, can be held liable: “To impose liability on the creator of such a system for potentially infringing outputs makes no more sense than imposing liability on the creator of a word processor simply because someone used it to draft a work of fiction that infringes on a copyrighted book.”⁷⁰ But this confuses the issue.

First, as set forth above, AI developers, and those compiling training datasets for them, may be directly liable for their role in making reproductions for training AI models if fair use does not apply. Second, the AI developers may be secondarily liable for an end user’s infringement. The makers of AI models and systems are nothing like makers of a VCR. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) involved the distribution of a product rather than a service and the company had no ongoing relationship with the consumer.⁷¹ Here, by contrast, AI models are offered as pre-programmed services to end users, where the

⁶⁹ In both its initial comments and reply comments, the Copyright Alliance distinguished many of these cases in detail. See Copyright Alliance at 54-57; Copyright Alliance Reply at Sections I.2, I.3, I.7; see also David Opderbeck at 3, 9; U.S. Patent & Trademark Office, *Public Views on Artificial Intelligence and Intellectual Property Policy* at 24.

⁷⁰ TechNet at 6; Google at 14 (“A rule that would hold AI developers directly (and strictly) liable for any infringing outputs users create would impose crushing liability on AI developers, even if they have undertaken reasonable measures to prevent infringing activity by users. Had that standard applied in the past, we would not have legal access to photocopiers, personal audio and video recording devices, or personal computers — all of which are capable of being used for infringement as well as for substantial beneficial purposes.”).

⁷¹ See Copyright Alliance Reply at Section II.1 (distinguishing *Sony*).

developer of that model has made specific choices regarding what outputs it is designed to create (including “guardrails” and any other instructions to *prevent* copyright infringement).

MPA urges the Office to identify and dispel false statements of law in the comments, like the aforementioned, rather than simply reiterating those stakeholder’s views. Such positions, if adopted, would undercut decades of fair use precedent by establishing the very bright lines that the Supreme Court has repeatedly rejected, and operate to the detriment of the creative industries.

IV. Stakeholders Largely Supported a More Nuanced Approach to Copyrightability and Registration.⁷²

Among the volume and breadth of the submissions to the Copyright Office, there was widespread consensus regarding the copyrightability of works created by humans with the assistance of AI as a tool.⁷³ Aided by this stakeholder input and the examples from creators, MPA urges the Office to refine its approach to copyrightability and registration as it continues to evaluate registrations involving AI. In particular, works created by human authors using AI tools (including tools that could loosely be described as generative AI under the NOI’s broad definition) are copyrightable when the work reflects the “original intellectual conception of the

⁷² This section addresses comments in response to Question 18 (copyrightability).

⁷³ See, e.g., Stability AI at 18 (“Generative AI systems are tools, not independent agents. These systems can help to support creative or analytic tasks, but they depend on a human in the loop to provide direction, and their contribution to the final work may be negligible. In that environment, AI-assisted outputs should be capable of attracting copyright protection, and the use of AI should not, by itself, disqualify a work from copyright protection.”); The Authors Guild at 31 (“Human creators can and do use generative AI to as a tool to assist in creation, and in many of those cases, the resulting work will be copyrightable authorship of the creator.”); Peermusic and Boomy at 7 (“[I]n some cases, a person interacting with AI-generated material may be considered the author of the material produced using the applicable AI tool, where the user provides the creative input required under the law.”); TechNet at 9 (“We encourage the Office to publicly state that human authorship utilizing Generative AI tools can be protectable under existing case law.”).

author,” as explained further in MPA’s Initial Comments and in this Reply.⁷⁴ The Office should further clarify that registrants do not need to disclaim uncopyrightable contributions of AI, unless those contributions constitute an “appreciable portion of the work as a whole.”⁷⁵

Copyrightability. As MPA noted in response to Question 18 in its Initial Comments, the AI Registration Guidance and the Office’s recent decisions in *Zarya of the Dawn* and *Théâtre D’opéra Spatial* appeared to adopt overly rigid rules that go beyond what the Supreme Court required for human authorship in *Sarony*, albeit within the particular, unique circumstances of those cases. With the benefit of commentors’ input, MPA urges the Office to apply a more nuanced approach going forward.

As an initial matter, commentors generally agreed that *purely* AI-generated works are not eligible for copyright protection.⁷⁶ Commentors also generally agreed that there are a variety of circumstances in which humans can use AI as a tool and the end result is still subject to copyright protection, particularly when the work reflects an author’s creative input and “original intellectual conceptions.”⁷⁷ For example, the Association of Medical Illustrators explained they

⁷⁴ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (“*Sarony*”).

⁷⁵ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 621.2 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (emphasis added).

⁷⁶ See *Thaler v. Perlmutter*, No. 22-cv-1564, 2023 WL 5333236, at *6 (D.D.C. Aug. 18, 2023) (holding that “a work generated autonomously by a computer system” is not copyrightable); Peermusic and Boomy at 9 (“*Thaler v. Perlmutter* put the question unequivocally before the court as ‘the sole issue of whether a work generated entirely by an artificial system absent human involvement should be eligible for copyright.’ [Footnote] The court’s answer was correct: no.”); The Authors Guild at 30 (“The Copyright Office, in line with longstanding case law and the D.C. District Court’s recent decision in *Thaler v. Perlmutter*, has adopted the position that copyright eligibility requires human authorship. Accordingly, any material that lacks human authorship should not receive copyright protection.”); Google at 12 (“As the Office has recognized, works that are generated by AI without cognizable human creative intervention are not copyright-eligible because they do not meet the constitutional requirement of authorship.”).

⁷⁷ *Sarony*, 111 U.S. at 58.

are “in a unique position to train an AI model with a database of [their] own copyrighted works,” and then may further direct the AI tools to a resulting copyrightable, expressive work.⁷⁸

Likewise, the Association of Test Publishers explained why, in the context of secure tests, “an extensive amount of human intervention is required, even when the process is assisted by GAI, such that the final work product (i.e., individual items or test forms assembled from such items) should still be copyrightable.”⁷⁹ Further, commentators recognized that “there is no reason in principle why prompts couldn’t be detailed enough to meet the traditional threshold of authorship in some cases.”⁸⁰ The NOI comments demonstrate that there is a general consensus supported by myriad examples of humans using AI as a tool to create copyrightable works.⁸¹

⁷⁸ Association of Medical Illustrators (“AMI”) at 9.

⁷⁹ The Association of Test Publishers (“ATP”) at 5-6 (internal citations omitted).

⁸⁰ Pamela Samuelson, Christopher Jon Sprigman & Matthew Sag at 3; *see* Adobe at 6 (“Additionally, as AI becomes more sophisticated, prompts may become multimodal, where an input could be comprised of not just text, but also a creator’s own starting image, which would be considered copyrightable.”); American Bar Association Intellectual Property Section at 11 (“The field of ‘prompt engineering,’ in which individuals are trained to produce desirable results from Generative AI Systems, and creatively iterate and dialogue with the system until their ‘mental conception’ or creative vision is achieved, is in its infancy and ought to be incentivized to grow.”); Van Lindberg at 41-42 (“The practice of developing a prompt that will give the desired output is sometimes referred to as ‘prompt engineering.’ Prompt engineering is actually an exploration through the latent space of the model—the probabilistic landscape of ideas and meanings—to match the generated expression to the author’s or artist’s conception. The goal of the author is to develop the exact set of inputs—images, words, and options—that will lead to the generation of the desired output.”); Edward Lee at 11-14 (detailing, with images, “examples to show how creators can make at least a minimally creative selection or arrangement of elements in images by using prompt-engineering of a series of images on Midjourney, Adobe’s Generative Fill, and DALL-E 3”); Lance Eliot, *Generative AI Prompt Engineering Boosted Brightly Via Clever Use Of Macros And By Devising Prompts Based On Clearcut End-Goal Planning*, FORBES (July 13, 2023), <https://www.forbes.com/sites/lanceeliot/2023/07/13/generative-ai-prompt-engineering-boosted-brightly-via-clever-use-of-macros-and-by-devising-prompts-based-on-clearcut-end-goal-planning> (detailing the “rapidly evolving realm” of prompt engineering, i.e., prompt design).

⁸¹ *See, e.g.*, Pamela Samuelson, Christopher Jon Sprigman & Matthew Sag at 4 (citing Dan L. Burk, *Thirty-Six Views of Copyright Authorship*, by Jackson Pollock, 58 HOUS. L. REV. 263

MPA urges the Office, in its future statements regarding the copyrightability of works that involve a human author’s use of AI as a tool, to focus the human authorship inquiry on the context-specific and flexible test that the Supreme Court put forth in *Sarony*: whether the works in question represent the “original intellectual conceptions of the author.”⁸² *Sarony* is the Supreme Court’s seminal decision on human authorship, and it focused on the human’s creative contributions, e.g., how to arrange, select, and position elements of the ultimate work.⁸³ Focusing on these creative choices ensures that copyright subsists in works that are derived from the author’s “own original mental conception, to which he gave visible form.”⁸⁴ Unlike the AI Registration Guidance and the Office’s recent decisions in *Zarya of the Dawn* and *Théâtre*

(2020)) (“Authorship often involves engaging with a physical medium in an iterative exploratory fashion, contemplating alternatives, embracing some and rejecting others. Consider, for example, a painter who flings paint at a canvas and then decides whether to fling more paint, or decides to start again on a fresh canvas. The painter has only a loose idea of what the work will look like as it takes shape, but when the work is finished, it is surely a work of authorship within the contemplation of the statute.”); Stability AI at 18 (“An overbroad rule that excluded or modified copyright for AI outputs would have the perverse effect of making AI-edited photographs (e.g. ‘portrait’ mode on an iPhone camera), AI-powered games, AI-supported designs, or AI-augmented soundtracks unprotectable. That would disrupt myriad existing users of AI-enabled tools; cause tangible economic loss to countless creators and professionals who choose to use AI systems in their workflows; and would undermine the incentives for AI development in the United States.”).

⁸² *Sarony*, 111 U.S. at 58; see also COMPENDIUM (THIRD) § 313.2 (quoting U.S. COPYRIGHT OFFICE, REPORT TO THE LIBRARIAN OF CONGRESS BY THE REGISTER OF COPYRIGHTS 5 (1966)) (“The crucial question is ‘whether the ‘work’ is basically one of human authorship, with the computer [or other device] merely being an assisting instrument, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or *elements of selection, arrangement*, etc.) were actually conceived and executed not by man but by a machine.”).

⁸³ *Sarony*, 111 U.S. at 60-61.

⁸⁴ *Id.*

D'opéra Spatial, the *Sarony* decision did not focus on—let alone rigidly require—the predictability of, and the author's control over, the ultimate output from a creative process.⁸⁵

As applied to the motion picture industry, AI is routinely used as a tool—in a manner that involves a human creator's intellectual and creative contributions that are inseparable from the ultimate work. The use of AI as a tool can help creators realize their vision and enhance the audience experience by making visual effects more dramatic, realistic, and memorable. MPA's members use AI as a production and post-production tool in the hands of human creators to enhance expressive material that they author. Some of these tools, which do not fit the current popular conceptions of “generative AI” but may fall within the NOI's broad definition of that term, assist with rotoscoping, aging and de-aging an actor, color correcting, detail sharpening, de-blurring, removing unwanted objects, background enhancements, stunts, and more. This creative process results in motion pictures that are indisputably copyrightable.

Registration. MPA's concerns about the Office's interim AI Registration Guidance's regarding requirements to disclaim AI in registration were echoed by others. As Peermusic (a music publishing company) and Boomy (a generative AI music company) explained: “The inconsistency among competing definitions of AI and subcategories of AI caution against any attempt to establish blanket rules applicable to the registration of all AI-related content or of ‘generative’ AI.”⁸⁶ The Office's registration requirements⁸⁷ place an unclear and unworkable burden on the parties registering works who are having to make difficult judgment calls regarding particular tools and uses. For example, the AI Registration Guidance specifically

⁸⁵ See MPA at 37-52.

⁸⁶ Peermusic & Boomy at 8.

⁸⁷ Artificial Intelligence and Copyright, 88 Fed. Reg. at 59948-49.

mentioned Photoshop as a type of technology whose use does not require disclaiming,⁸⁸ but there are numerous AI tools that play a similar role.⁸⁹ While the Office has instructed registrants to disclaim AI-generated material, it did not provide workable guidance on exactly what “AI-generated material” means and does not mean.

Months after issuing its AI Registration Guidance, the Office published its NOI, which adopts a broad, sweeping definition of “Generative AI” that purports to cover any AI technology with “outputs in the form of expressive material.”⁹⁰ This broad definition is both problematic and confusing because it potentially sweeps in technologies that creators use routinely in making motion pictures, particularly in the areas of visual effects and post-production.⁹¹

The effects of the NOI’s broad definition of “Generative AI” are exacerbated by the Office’s decision to apply a “more than *de minimis*” standard or, alternatively, whether the work

⁸⁸ AI Registration Guidance, 88 Fed. Reg. at 16193 (footnote omitted) (“This policy does not mean that technological tools cannot be part of the creative process. Authors have long used such tools to create their works or to recast, transform, or adapt their expressive authorship. For example, a visual artist who uses Adobe Photoshop to edit an image remains the author of the modified image, and a musical artist may use effects such as guitar pedals when creating a sound recording.”).

⁸⁹ *Cf.* AMI at 9 (footnotes omitted) (“When an illustrator is able to populate a database solely with their own copyrighted works, and further ‘directs the tool’s accomplishment of its task and entirely forms the conception that will determine the expressive content of the result.’— ‘then the user has both conceived of and executed the resulting work, and is therefore the sole author of the resulting work just like the user of an ‘ordinary tool.’ In this circumstance the AI model functions as an ‘ordinary tool’ for the illustrator to access and create new works, and the illustrator should be allowed to register their copyrights as the author.”).

⁹⁰ Artificial Intelligence and Copyright, 88 Fed. Reg. at 59948-49.

⁹¹ See Sunny Dhillon, *How AI Will Augment Human Creativity in Film Production*, VARIETY (July 20, 2023), <https://variety.com/vip/how-artificial-intelligence-will-augment-human-creatives-in-film-and-video-production-1235672659> (discussing <https://runwayml.com> suite of AI tools and how “filmmakers can use AI-powered techniques to automate time-consuming manual tasks such as motion tracking and visual effects”); Devin Coldewey, *VFX Artists Show that Hollywood Can Use AI to Create, Not Exploit*, TECHCRUNCH (Aug. 25, 2023), <https://techcrunch.com/2023/08/25/vfx-artists-show-that-hollywood-can-use-ai-to-create-not-exploit>.

would be independently copyrightable under the *Feist*⁹² standard for determining whether purely AI-generated material should be disclaimed.⁹³ This standard is impractical and difficult to apply, particularly in the context of motion pictures, which combine myriad elements into a single work, for the reasons MPA explained in response to Question 18 in its Initial Comments and will not repeat here. Comments from other industries, including the music industry, expressed similar concerns about the practical issues with the Office’s position on registration.⁹⁴

MPA respectfully requests that, for registration purposes (1) the Office should not require MPA’s members to disclaim aspects or portions of motion pictures that are copyrightable, because they use AI as a tool in the hands of human creators; and (2) the Office should clarify that the governing standard for disclaimer as it relates to purely AI-generated material is “only if it represents an appreciable portion of the work as a whole.”⁹⁵

⁹² *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

⁹³ MPA at 52-58; U.S. Copyright Office, *Application Process for Registration of Works with Artificial Intelligence-Generated Content*, Tr. at 2 (2023), <https://www.copyright.gov/events/ai-application-process/Registration-of-Works-with-AI-Transcript.pdf>.

⁹⁴ See *Peermusic and Boomy* at 13 n.41 (“Under the Copyright Office’s suggested guidance, we must either require our writers to disclose with specificity any AI in the works they deliver, or warrant and represent to us that they did not use AI. Some publishers may create opportunities for disclosure, but many will more simply prohibit the use of AI within standard contractual warranties and representations of originality. Consequently, requirements for disclosure of AI content will create a tripwire to breach of contract that doesn’t exist today: a writer may believe the use of AI was *de minimis* and fail to disclose, or be entirely unaware of the use of AI by a co-writer or producer, or simply elect not to disclose for her own reasons.”).

⁹⁵ COMPENDIUM (THIRD) § 621.2; see MPA at 52-58.

V. **Any Proposed Federal Legislation to Address “Digital Replica” Rights Needs to Address First Amendment Concerns.**⁹⁶

Several stakeholders, particularly those representing performing artists, advocate for a federal right of publicity law, or one targeting digital replicas in particular.⁹⁷ Adobe offers a different proposal, not expressly supported by the creative communities, for a new “Federal Anti-Impersonation Right” (“FAIR” Act) to address scenarios where a *user* of an AI model replicates a creator’s style and competes with that creator’s original work.⁹⁸ Adobe’s proposal places liability only on the end user and only when there is an “intent to impersonate” the style of a creator.⁹⁹

MPA and its members share the concerns raised by actors and recording artists regarding the risks posed by unauthorized and harmful uses of AI-generated digital replicas of their likenesses or voices, which could potentially replace performances by them in expressive works (i.e., non-commercial speech) and impact their ability to earn a living. MPA has been engaged in discussions regarding this sort of legislation, including on the “Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act,” a discussion draft of which was released October 12, 2023 by Senators Chris Coons, Marsha Blackburn, Amy Klobuchar, and Thom Tillis, which

⁹⁶ This section addresses legislation recommendations in response to Question 31 (federal right of publicity).

⁹⁷ Recording Academy at 13 (“Yes, the Academy supports the establishment of a federal Right of Publicity, and we are actively advocating Congress to pass such a law.”); Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”) at 7-8 (same, supporting NO FAKES Act).

⁹⁸ Adobe at 8.

⁹⁹ *Id.*

would establish a new federal intellectual property right governing the use of digital replicas.¹⁰⁰ Senator Blackburn asked for the Office’s feedback on the draft NO FAKES Act legislation.¹⁰¹

MPA agrees that narrow and targeted federal legislation in this area may be appropriate, but stresses the care that must be taken to ensure that any such right that would apply in expressive works does not interfere with the First Amendment rights and core creative freedoms of filmmakers and others who may use digital replicas for legitimate, constitutionally protected purposes.

A. First Amendment considerations

Unlike copyright, which is grounded in express constitutional authority,¹⁰² and which contains the “built-in First Amendment accommodations” of the fair use doctrine and the idea/expression dichotomy,¹⁰³ regulation of the uses of individuals’ name, image, likeness, and voice is of relatively recent vintage, and must be strictly cabined to avoid a conflict with First Amendment rights. Any law that regulates speech based on “particular subject matter”—here, the unauthorized use of a digital likeness—is “obvious[ly]” a content-based law under the Supreme Court’s test in *Reed v. Town of Gilbert, Arizona*.¹⁰⁴ It is therefore “presumptively

¹⁰⁰ See Press Release, Chris Coons, Senator, U.S. Senate, Coons, Blackburn, Klobuchar and Tillis’ statements on Draft of Bill to Protect Voice and Likeness of Actors, Singers, Performers and Individuals from AI-generated replicas (Oct. 12, 2023), <https://www.coons.senate.gov/news/press-releases/senators-coons-blackburn-klobuchar-tillis-announce-draft-of-bill-to-protect-voiceand-likeness-of-actors-singers-performers-and-individuals-from-ai-generated-replicas>.

¹⁰¹ See Senator Marsha Blackburn at 3 (stressing the importance of prohibiting “non-consensual digital replicas” and “welcom[ing] any feedback that the office may have” on the proposed federal legislation).

¹⁰² U.S. Const. Art. I, Sec. 8, Cl. 8.

¹⁰³ See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

¹⁰⁴ 576 U.S. 155, 163 (2015). Applying *Reed*, the Ninth Circuit held that “California’s right of publicity law clearly restricts speech based upon its content,” and therefore must survive strict scrutiny to be constitutional. *Sarver v. Chartier*, 813 F.3d 891, 903 (9th Cir. 2016); see also

unconstitutional” and subject to the most demanding level of constitutional review: strict scrutiny.¹⁰⁵

1. *A federal digital-replica right would need to serve a compelling government interest.*

As with any other content-based restriction on speech, a law establishing a digital-replica right could clear the strict-scrutiny hurdle only if it serves a compelling governmental interest.¹⁰⁶ Replacement of professional performers with digital replicas without their consent might be found by courts to provide a compelling state interest sufficient to satisfy constitutional requirements, as such uses could interfere with those performers’ ability to earn a living. This would, of course, be a background principle of law targeting those unauthorized uses and should not interfere with professional performers’ abilities to enter into contracts that further their economic interests.

2. *A federal digital-replica right must be narrowly tailored to serve that interest.*

A digital-replica right would also need to be “narrowly tailored to serve” the asserted compelling government interest.¹⁰⁷ This is crucial to ensure respect and sufficient space for filmmakers’ and others’ freedom to use technology to enhance creative process for the ultimate benefit of audiences. Digital replicas have myriad entirely legitimate uses, ones that are fully

Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 912 n.35 (“The right of publicity is clearly content-based: It prohibits the unlicensed use of particular content (people’s names or likenesses)”); noting also that “[E]ven if [right of publicity is] seen as content-neutral, strict scrutiny is still the proper test, because the right of publicity doesn’t leave open ample alternative channels for the speaker to convey the content that he wishes to convey.”).

¹⁰⁵ *Reed*, 576 U.S. at 163.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

protected by the First Amendment, and which must remain outside the scope of any digital-replica statute for it to survive strict scrutiny.

For example, digital replica technology follows in a long line of technological innovations in depictions of individuals that allow creators to achieve their visions. Examples include using a real person's actual image (e.g., clips of interviews with real individuals in the end credits of *I, Tonya*); or use of digital technology to alter pre-existing footage (e.g., the depictions of Presidents Kennedy, Johnson, and Nixon in fictional settings in *Forrest Gump*); or using prosthetics, makeup, and visual effects to make an actor more resemble the real person he or she is portraying (e.g., Gary Oldman as Sir Winston Churchill in *The Darkest Hour*; Nicole Kidman as Virginia Woolf in *The Hours*). No one questions that the First Amendment protects a creator's ability to use these and similar techniques to bring verisimilitude to their work. Technology simply allows the filmmaker to do the same thing with greater realism. It supports the audience's immersion in the story and suspension of disbelief, which are critical elements of cinematic storytelling.

Digital replicas could also be highly effective tools for parody and satire, forms of social or political commentary that the Supreme Court has held deserve high levels of protection.¹⁰⁸ Imagine, for example, a late-night comedy show using digital replicas to poke fun at celebrities, politicians, athletes, or whoever happens to be in the news that week. Or documentarians could use digital replicas to re-create scenes from history where no actual footage exists, to enhance the visual appearance and verisimilitude of the scene (with disclosures where appropriate).

¹⁰⁸ See *Campbell*, 510 U.S. 569; *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988).

B. Statutory exemptions and preemption

As with existing state right-of-publicity laws, any federal digital-replica right must include clear statutory exemptions to provide certainty to both creators and depicted individuals, which helps avoid unnecessary litigation as well as constitutional vagueness and overbreadth concerns.¹⁰⁹ Indeed, in discussing a potential federal right-of-publicity law in its 2019 moral rights report, the Copyright Office advised that “such a [right-of-publicity] law would . . . benefit from explicit carve-outs for expressive works and other exceptions for First Amendment-protected activities.”¹¹⁰ The need for specific statutory exemptions is even more crucial in the context of a potential digital replica right, which—unlike most existing right-of-publicity statutes—would apply in expressive works, including motion pictures. At minimum, a bill establishing a federal digital-replica right must include exemptions where the use is in a work of political, public interest, educational, or newsworthy value, including comment, criticism, or parody, or similar works, such as documentaries, docudramas, or historical or biographical works, or a representation of an individual as himself or herself, regardless of the degree of fictionalization, and for uses that are *de minimis* or incidental.¹¹¹

¹⁰⁹ A law firm representing independent documentarians and other filmmakers reiterated this point in their opening comments. Donaldson Callif Perez, LLP at 9-10 (“[T]he extension of right of publicity to encompass creative and expressive works would have a disastrous impact on artists’ rights under the First Amendment”).

¹¹⁰ U.S. Copyright Office, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States* at 119 (Apr. 2019); see also *id.* at 5 (“Any such law, if adopted, should include an exception for First Amendment-protected activities and may require significantly more government analysis since this was not the sole focus of the current review.”), <https://www.copyright.gov/policy/moralrights/full-report.pdf>.

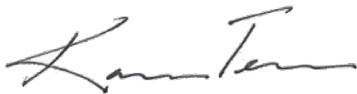
¹¹¹ States that have enacted statutes regulating the use of digital replicas have included such statutory exemptions. See N.Y. Civ. Rights Law §50-f(2)(d)(ii); La. Stat. Ann. § 51:470.5.

Further, any federal statute establishing a digital-replica right must preempt existing state laws to the extent that they apply to the use of digital replicas in expressive works. While many state right-of-publicity statutes contain express statutory expressive-works exemptions, not all do, and the case law regarding the proper test for evaluating First Amendment defenses in this context is in disarray.¹¹² If there is to be a federal digital-replica right, it must be carefully crafted to avoid interference with First Amendment rights, and should provide national uniformity.

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MPA appreciates this opportunity to provide its views in these Reply Comments. MPA looks forward to providing further input and working with the Copyright Office as it continues its consideration of these important issues.

Respectfully submitted,



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¹¹² See Brief of 31 Constitutional Law and Intellectual Property Law Professors as *Amici Curiae* in Support of Petitioner at 6-18, *Elec. Arts Inc. v. Davis*, 577 U.S. 1215 (2016) (No. 15-424) (identifying five different tests: (1) the transformative use test; (2) the transformative work test; (3) the relatedness test; (4) the predominant purpose test; and (5) the balancing test), <https://www.scotusblog.com/wp-content/uploads/2015/11/15-424-Amici-Brief.pdf>.