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

In the Matter of Artificial Intelligence and Copyright **Notice of Inquiry and Request for Comments**	**Docket No. USCO 2023-6**

COMMENTS OF THE

MOTION PICTURE ASSOCIATION, INC.

I. PRELIMINARY COMMENTS

The Motion Picture Association, Inc. ("MPA") appreciates the opportunity to respond to the Copyright Office's Notice of Inquiry and Request for Comments on Artificial Intelligence and Copyright (Docket No. USCO 2023-6), 88 Fed. Reg. 59942 (Aug. 30, 2023) ("Notice of Inquiry" or "NOI").

MPA is a not-for-profit association founded in 1922 to address issues of concern to the motion picture industry. Over its more than 100-year history, MPA has grown to become the premier global advocate of the film, television, and streaming industry. MPA's members are: Walt Disney Studios Motion Pictures; Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; and Warner Bros. Entertainment Inc. MPA's members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets.

Throughout their history, MPA's members and the countless people working with them to bring the magic of moviemaking to the screen have been pioneers and beneficiaries of

technological innovation. Creators are innovators by nature; they always rely on a range of tools, including technological tools, to give life to their artistic vision and to connect their works with widespread and diverse audiences. To that end, MPA's members have invested substantially in developing themselves and supporting others who develop cutting-edge technological tools for creators to use in creating motion pictures and television programs.

MPA's members have a uniquely balanced perspective regarding the interplay between AI and copyright. The members' copyrighted content is enormously popular and valuable. Strong copyright protection is the backbone of their industry. At the same time, MPA's members have a strong interest in developing creator-driven tools, including AI technologies, to support the creation of world-class content. AI, like other tools, supports and enhances creativity, and draws audiences into the stories and experiences that are the hallmark of the entertainment industry.

MPA's overarching view, based on the current state, is that while AI technologies raise a host of novel questions, those questions implicate well-established copyright law doctrines and principles. At present, there is no reason to conclude that these existing doctrines and principles will be inadequate to provide courts and the Copyright Office with the tools they need to answer AI-related questions as and when they arise. The Copyright Office has an important role to play in ensuring a careful and considered approach to AI and copyright. At the current time, however, there is no need for legislation or special rules to apply copyright law in the context of AI.

Before turning to the Office's specific questions, MPA would like to comment on the NOI's definition of "Generative AI." Specifically, the NOI defines "Generative AI" as: "An application of AI used to generate *outputs in the form of expressive material* such as text, images,

audio, or video. Generative AI systems may take commands or instructions from a human user, which are sometimes called 'prompts.' Examples of generative AI systems include Midjourney, OpenAI's ChatGPT, and Google's Bard."[1]

This broad definition, and the Copyright Office's recent decisions involving generative AI, are susceptible of being misconstrued and do not reflect or correspond to how MPA's members use AI technology. The Office appears to be focused on AI systems like Midjourney, in which the user types words into a prompt box and the AI system produces output in the form of expressive material (e.g., an image). For the MPA's members, in contrast, AI is a tool that supports, but does not replace, the human creation of the members' works. MPA's members are not, as a general matter, using the sorts of generative AI that the Office provides as examples in the NOI (to produce production-ready content). Members may explore such uses in the future. At present, however, the members utilize AI tools primarily to save time on repetitive and detail-oriented tasks in motion picture production and post-production. Because the NOI's definition on its face broadly covers any AI technology with "outputs in the form of expressive material," there is a significant risk that policy statements intended to cover specific uses of prompt-based tools like Midjourney could be applied inappropriately to other AI technologies that are very different for purposes of the copyright analysis.

To that end, MPA believes the Office should take care that any reports, rules, or policy statements it issues or adopts are attentive to the current and foreseeable differences in the broad array of technologies that may fall under the broad umbrellas of "AI" or "generative AI," as well as differences in the ways that creators interact with those technologies.

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[1] Artificial Intelligence and Copyright, 88 Fed. Reg. 59942, 59948-49 (Aug. 30, 2023) (emphasis added).

The Office's AI Registration Guidance purported to recognize the need for careful differentiation among various types of AI tools and uses of those tools. The AI Registration Guidance noted that questions involving the interplay between copyright and AI necessarily will "depend on the circumstances, particularly how the AI tool operates and how it was used to create the final work,"[2] and that "[m]any technologies are described or marketed as 'artificial intelligence,' but not all of them function the same way for purposes of copyright law."[3] Unfortunately, the AI Registration Guidance's specific policy statements on the copyrightability of AI-generated material and the need to disclaim such material in copyright applications, along with the Office's recent registration decisions, do not appear to take this approach.

The Office has not yet sufficiently distinguished between generative AI where the AI model itself creates the expressive material (e.g., Midjourney), on the one hand, and the use of routine post-production AI tools that could fall under the Office's broad definition (e.g., a human post-production creator using AI as a tool to remove mud from a performer's clothing in successive frames for a motion picture), on the other. To date, the Office's treatment of generative AI does not appear to be "fact specific" or "case-by-case,"[4] but instead appears to be moving toward bright-line and potentially inflexible rules. Such rules are inappropriate for MPA's members' works. MPA respectfully submits that the Office should eschew these categorical approaches. Future guidance should limit the Office's prior decisions to their facts

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[2] Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202) ("AI Registration Guidance").

[3] *Id*. at 16192 n.25.

[4] *Id*. at 16192 & n.25.

and be more attentive to important differences in AI technology and the ways human creators use that technology in the creative process.

II. MPA'S RESPONSES TO SPECIFIC QUESTIONS

A. General Questions: Risks & Benefits of AI, Unique Issues for the Motion Picture Industry, International Consistency, and New Legislation (Responding to Questions 1, 2, 4 & 5)

> *Question 1:* [G]enerative AI systems have the ability to produce material that would be copyrightable if it were created by a human author. What are your views on the potential benefits and risks of this technology? How is the use of this technology currently affecting or likely to affect creators, copyright owners, technology developers, researchers, and the public?

As discussed above, the Notice of Inquiry's very broad definition of "generative AI" has the potential to sweep in technologies that are not new and that members use to assist creators in making motion pictures, particularly in the areas of visual effects and post-production. Technologies utilizing some form of machine or computational intelligence for the benefit of developing motion pictures have existed, and contributed to, the creation of original expression for decades. It is true, as the Notice of Inquiry observes in the first sentence of its Introduction, that recent developments have advanced at a significant pace and "attracted significant media and public attention."[5] But recent AI developments will not necessarily require copyright law to evolve in a dramatically different manner than it has in the past. Developments in AI, like preceding technological advancements, have a great potential to enhance, not replace, human creativity. MPA's members further believe these developments can, and should, co-exist with a copyright system that incentivizes the creation of original expression and protects the rights of copyright owners.

[5] 88 Fed. Reg. at 59942.

The creative expression of human beings is, and always will be, the lifeblood of the motion picture industry. And AI can, and does, facilitate that human creativity, including by freeing creators from tedious and repetitive tasks that are a necessary component of creating world-class audiovisual content. AI provides more time and tools for content creators to be creative.

For example, animators and visual effects artists for decades have used a process called rotoscoping, which involves manually altering individual frames within a single shot to align live-action and computer-generated images.[6] That work is incredibly detail oriented and time consuming. Contemporary visual-effects artists now have sophisticated tools, some of which incorporate AI technology, to assist with this type of work. Using these tools frees artists to focus their energies on the creative aspects of the visual effects.[7]

AI also helps creators realize their vision and enhance the audience experience by making visual effects more dramatic, realistic, and memorable. Creators can use AI for everything from color correction, detail sharpening, and de-blurring; to removing unwanted objects from a scene; to more involved work like aging and de-aging an actor; or to adjusting the placement of computer-generated images to make sure everything in a scene flows smoothly and aligns properly.[8] Artists have expressed enthusiasm for AI tools that enhance their work, and for

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[6] Avais Gilani, *Why Rotoscoping with AI Is Necessary*, MEDIUM (Sept. 19, 2023), https://medium.com/shade-inc/why-rotoscoping-with-ai-is-necessary-be1fdb7e01c1.

[7] *Id.*

[8] *See* Sunny Dhillon, *How AI Will Augment Human Creativity in Film Production*, VARIETY (July 20, 2023, 6:00 AM), 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,

continued technological development of these and similar tools.[9] In short, the use of AI technology presents developing opportunities for creators and their audiences.[10] MPA's members are optimistic about that future.[11]

Insofar as copyright is concerned, MPA believes that risks arise from thinking that a new form or new application of technology requires jettisoning established principles in favor of new *sui generis* rules. The precise application of copyright law to new factual scenarios involving AI is in its most nascent stages. At present, MPA's members believe the questions that AI raises implicate well-established principles of copyright law, and there is no reason to conclude the law as it stands is inadequate as courts and the Copyright Office address emerging factual scenarios.

In sum, the copyright laws have addressed and adapted to other technological changes for over a century. At least as matters now stand, there is no reason to think that existing law is inadequate to deal with the current state of AI.

11:32 AM), https://techcrunch.com/2023/08/25/vfx-artists-show-that-hollywood-can-use-ai-to-create-not-exploit/?guccounter=1.

[9] Coldewey, *supra* note 8.

[10] MPA's members are closely monitoring the development of generative AI models and considering whether (if at all) some of these tools may be useful to assist creators in their industry, while at the same time remaining vigilant about protecting their existing and highly valuable content.

[11] AI also presents an opportunity for the business side of the creative industries—like other consumer-centric industries—including providing new and cost-effective ways for MPA's members to market their movies and TV shows as well as drive engagement with their brands and characters on social media and online generally. *See, e.g.*, Adrianne Pasquarelli, *How Retailer CB2 Is Using AI to Make Streaming TV Ads from Its Social Media Content*, ADAGE (Sept. 28, 2023), https://adage.com/article/marketing-news-strategy/retailer-cb2-uses-ai-convert-social-media-content-streaming-tv-ads/2518986.

> *Question 2:* Does the increasing use or distribution of AI-generated material raise any unique issues for your sector or industry as compared to other copyright stakeholders?

Yes. MPA seeks to highlight the Office's policy statement and guidance regarding registration for works involving generative AI as uniquely salient, and potentially problematic, for the motion picture industry.

As relevant context, MPA's members are unique among copyright stakeholders in that they create their copyrighted works by bringing together the talents and contributions of hundreds, and in many cases thousands, of people to create a single copyrighted motion picture work. Deploying a "cast of thousands" inherently creates operational complexities and a need for logistics and synchronicity. All of this makes the production of motion picture and television content incredibly costly and time intensive. AI has the potential to help alleviate some of the time-intensive aspects of this work and thereby support the contributions of creators in ways that ultimately benefit the entire process.

Those innovation-enhancing and creativity-enhancing developments should not be frustrated by unnecessary requirements in the copyright registration process. Registration is a matter of critical importance to MPA's members, who in total register thousands of works each year. MPA's members must register their works to enforce their rights in court against unscrupulous infringers who, through piracy, seek to capitalize on the members' investments and creative works. MPA's members therefore have a significant interest in the regulations governing copyright registration and any changes to those regulations.

A number of statements in the Copyright Office's AI Registration Guidance present significant and unique concerns for MPA's members as copyright stakeholders. The Office instructs that "AI-generated content that is more than *de minimis* should be explicitly excluded

from the application."[12] During the June 28, 2023 webinar, the Copyright Office added that material would need to be disclaimed if, "standing on its own [it would] be sufficient to satisfy the *Feist* copyrightability standard if it had been created by a human author."[13] MPA respectfully submits that the Office's policy is misguided, both as a matter of copyrightability and traditional approaches to registration. Further, the policy is inconsistent with long-standing registration requirements, unreasonably burdensome, and not compelled by law. MPA's response to Question 18 discusses these issues in more detail. MPA highlights here three significant problems with this policy:

First, the Copyright Office's specific focus on "AI-generated content" or "AI-generated material" does not account for the myriad ways in which AI might be deployed in the motion picture production process, both now and in the future. While the AI Registration Guidance recognized that "not all [AI systems] function the same way for purposes of copyright law,"[14] the AI Registration Guidance went on to announce—and the Office's decisions have increasingly followed—broad and seemingly inflexible rules regarding how the Office intends to approach the registration of any works created with the use of any AI. The Office's approach appears to be driven by concerns about specific visual-art registration applications that have contained self-

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[12] AI Registration Guidance, 88 Fed. Reg. at 16193; *see also id*. at 16192 (AI-generated "material is not protected by copyright and must be disclaimed in a registration application"). The Office reiterated the AI Registration Guidance's position in its June 28, 2023 webinar "Registration Guidance for Works Containing AI-Generated Content." U.S. Copyright Office, *Application Process for Registration of Works with Artificial Intelligence-Generated Content*, Tr. at 8-9 (2003) ("June 28 Webinar Tr."), https://www.copyright.gov/events/ai-application-process/Registration-of-Works-with-AI-Transcript.pdf ("De minimis and appreciable are opposites or inverse concepts. And so once you rise above de minimis, you have reached the level of appreciable that would need disclosure."); *see generally id.* at 1-11.

[13] *Id.* at 2 (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co*., 499 U.S. 340, 345 (1991)).

[14] AI Registration Guidance, 88 Fed. Reg. at 16192 n.25.

identified, AI-generated expressive elements. Respectfully, those concerns are inapposite in the context of motion picture production, where AI functions as one of many tools that artists use for assistance in the creative process. AI's function there is more akin to Photoshop, which the AI Registration Guidance specifically describes as the type of technology whose use does not require disclaiming,[15] than it is to a device that actually drives or determines the ultimate expression in the motion picture. The fact that filmmakers use such AI tools to assist in production must not mean that parts of the motion picture are unprotected by copyright. Nor should the use of those tools, with sufficient human oversight, require copyright owners to disclaim elements of the motion picture in a registration application.

Second, MPA believes that, as a general matter and absent specific indication that AI-generated material constitutes a substantial portion of the work, the Office should not depart from its standard practice of not inquiring into the specific creative tools that applicants utilize in creating their works. Such an inquiry would be a new, unreasonable, and arbitrary requirement for registration. MPA's members employ hundreds or thousands of creators in the process of making a motion picture, and the members may lack ready access to the detailed information the Office may request or require to be examined pursuant to its guidance. To the extent difficult edge cases arise regarding whether a particular work or component of a work is within the subject matter of copyright, those questions are appropriately addressed in the context of specific enforcement proceedings. For example, in copyright infringement litigation involving the alleged copying of AI-generated material, the normal evidence-development process could help

[15] *Id.* 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.").

to elucidate difficult, fact-intensive issues regarding copyrightability. New requirements mandating the provision of additional information and entailing back-and-forth engagements with the Copyright Office are bound to be inefficient and cumbersome.

Third, adding new, amorphous registration requirements threatens copyright owners' ability to enforce the rights Congress has provided. Unscrupulous infringers are constantly looking for ways to slow down and disrupt enforcement actions. Regrettably, an increasingly popular means for frustrating copyright enforcement is for infringer-defendants to challenge the accuracy of the registration and request a Copyright Office referral pursuant to 17 U.S.C. § 411(b)(2). Such referrals are mandatory, making them particularly inviting for infringers looking to stave off responsibility for their unlawful conduct.[16]

For these reasons, and those discussed in greater detail in response to Question 18, MPA respectfully requests the Office revisit its registration requirements as applied to the case of human-authored motion picture works that include elements where humans may use AI as a tool. MPA respectfully requests the opportunity to provide stakeholder input on future guidance like the AI Registration Guidance, including revisions to the Compendium of U.S. Copyright Office Practices that may significantly impact copyright registration duties and obligations.

[16] 17 U.S.C. § 411(b)(2) (emphasis added) ("In any case in which inaccurate information . . . *is alleged*, the court *shall* request the Register of Copyrights to advise the court whether the inaccurate information, if known, would have caused the Register of Copyrights to refuse registration.").

> *Question 4:* Are there any statutory or regulatory approaches that have been adopted or are under consideration in other countries that relate to copyright and AI that should be considered or avoided in the United States?[17] How important a factor is international consistency in this area across borders?

The United States has long set a global example on copyright law and policy and played a strong role in shaping international norms. As it has done before, the United States should navigate the interplay between copyright and AI with moderation, restraint, and respect for copyright.[18] Some other jurisdictions have moved quickly to provide broad exemptions from copyright protections for "AI," or for so-called "text and data mining" ("TDM"). Reflexive approaches that do not take into account the speed with which AI is evolving and the diversity of AI technologies have the potential either to create unreasonably broad copyright exemptions or to hamper innovation. Such approaches therefore miss the opportunity to find the appropriate middle ground.

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[17] For example, several jurisdictions have adopted copyright exceptions for text and data mining that could permit use of copyrighted material to train AI systems. Separately, the European Parliament passed its version of the Artificial Intelligence Act on June 14, 2023, which includes a requirement that providers of generative AI systems publish "a sufficiently detailed summary of the use of training data protected under copyright law." *See* Artificial Intelligence Act, amend. 399, art. 28b(4)(c), EUR. PARL. DOC. P9_TA(2023)0236 (2023), https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.html.

[18] Notably, MPA does not believe the issues relating to AI are sufficiently developed or clear to be candidates for WIPO SCCR norm-setting, and the U.S. should not encourage such premature global processes while the market, technology, and regulations continue to develop. *See, e.g.*, World Intellectual Property Organization General Assembly 2021, *Statement of the United States on the SCCR Work Program – Report on the Standing Committee on Copyright and Related Rights (SCCR)*, Statement Submitted by the United States (Oct. 6, 2021), https://www.keionline.org/36752 ("The United States believes that the current international framework for copyright exceptions and limitations provides the flexibility, consistent with well-established international standards, for countries to adopt exceptions and limitations to advance their own national social, cultural and economic policies. We therefore do not think it is advisable for WIPO to engage in norm-setting work that would impose minimum requirements in this area.").

In general, MPA supports the existing international legal framework for protection of copyright and related rights. That framework provides a principled consistency that has successfully shaped global norms while still allowing for differences in national approaches. For example, the United States generally relies on the fair use defense to determine whether an exception to the exclusive right of copyright may be appropriate in fact-specific circumstances.[19] Other countries, in contrast, have adopted more specific exceptions-based systems.[20] MPA believes that in its current state, the existing U.S. fair use framework ought to be fit to handle this analysis. There is no need at this time for U.S. law to adopt special copyright exceptions for AI.

As a contrast to the approach under U.S. law, consider the special TDM exemptions some other countries have adopted in the name of promoting innovation. Japan, for instance, has enacted a "non-enjoyment" exception for TDM. This exception generally exempts TDM from the requirements of Japanese copyright law, provided that (1) it is "not a person's purpose to personally enjoy or cause another person to enjoy the thoughts or sentiments expressed in [the copyrighted] work" and (2) the use does not "unreasonably prejudice the interests of the copyright owner in light of the nature or purpose of the work or the circumstances of its

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[19] 17 U.S.C. § 107.

[20] Some stakeholders have argued that the international "safe harbor[]" exemptions in Singapore, Japan, and the EU "achieve similar effects to fair use." *Artificial Intelligence and Intellectual Property – Part II: Copyright: Hearing Before the Subcomm. on Intellectual Property of the S. Comm on the Judiciary*, at 8 (2023) (Ben Brooks, Head of Public Policy at Stability AI, responses to questions from Senator Tillis) ("Brooks Testimony"), https://www.judiciary.senate.gov/download/2023-07-12-pm-testimony-brooks. MPA does not agree. As discussed in response to Question 8, the case-by-case fair use analysis accounts for numerous facts that other jurisdictions have deemed irrelevant to blanket exceptions.

exploitation."[21] Singapore's TDM exception is equally broad and does not provide any ability for rightsholders to opt out.[22]

MPA submits that these types of exemptions are bad policy, and they likely fail to comply with the Berne Convention's "three-step" test.[23] For example, bad actors may use overbroad TDM exceptions as a pretext for both piracy and the downstream use of pirated works for any purpose. Further, as MPA explains in response to Question 10, copyright owners' licensing markets for training AI models have been developing. Legislation that would broadly exempt certain unauthorized uses would interfere with the continued development of those markets.[24] MPA believes U.S. copyright law should refrain from adopting the broad exceptions that Japan, Singapore, and other jurisdictions have enacted, and instead adhere to the fair use framework for analyzing particular use cases.

> *Question 5:* Is new legislation warranted to address copyright or related issues with generative AI? If so, what should it entail? Specific proposals and legislative text are not necessary, but the Office welcomes any proposals or text for review.

MPA does not believe new copyright legislation pertaining to generative AI is necessary or appropriate at this time. AI will continue to raise many interesting and important copyright issues. The Copyright Act and case law interpreting it appear to be well-suited to allow courts

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[21] Chosakukenhō [Copyright Act], Law No. 48 of 1970, art. 30-4, https://www.japaneselawtranslation.go.jp/en/laws/view/4207#je_ch2sc3sb5at4.

[22] Copyright Act of 2021, Law No. 22, pt. 5, div. 8, paras. 243-244 (Oct. 8, 2021).

[23] The currently operative version of the three-step test is set forth in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1C, TRIPS Agreement, art. 13 ("Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.").

[24] *See infra* response to Question 10.

and the Copyright Office to address these issues. Courts, the Copyright Office, and other decision-makers and agencies should approach these questions in a thoughtful and careful manner and should resist trying to draw definitive conclusions based on limited experience and information.

B. Training: Fair Use Defense for Training on Copyrighted Material, Consent, and Licensing for Training Datasets (Responding to Questions 8-9.1, 9.4-11, 13)

> *Question 8:* Under what circumstances would the unauthorized use of copyrighted works to train AI models constitute fair use? Please discuss any case law you believe relevant to this question.

The fair use defense requires that courts take a "subtle, sophisticated approach" to each case, rather than establishing broad, categorical rules.[25] Given the intensely fact-intensive nature of fair use, it is neither feasible nor appropriate to define *ex ante* the circumstances in which the defense would apply to uses of copyrighted works to train AI models.

The fair use defense, which originated at common law, is a "privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent."[26] As codified by statute, the defense requires "a case-by-case determination whether a particular use is fair," based on "four nonexclusive factors":[27] (1) "the purpose and character of the use"; (2) "the nature of the copyrighted work"; (3) "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and (4) "the effect of the use upon the potential market for or value of the copyrighted work."[28] The Supreme Court has

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[25] *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 921 (2d Cir. 1994).

[26] *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985); *see Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575-76 (1994) (discussing common-law origins of fair use).

[27] *Harper & Row*, 471 U.S. at 549.

[28] 17 U.S.C. § 107.

emphasized that the four statutory factors are to be "weighed together, in light of the purposes of copyright," and that the "task is not to be simplified with bright-line rules."[29]

The outcome of the fair use inquiry in specific use cases cannot be predicted or decreed in advance. What can be said is that certain facts pertaining to the specific use in any case will matter greatly in the fair use analysis: the type and stage of training, the materials used for training, the source of those materials, and the identity and purpose of the party conducting the training and using the outputs.

Precedent shows that courts have reached different conclusions in the context of mass digitization of books and other copyrighted works. The facts of those cases have driven the fair-use result. For example, the Second Circuit said that the copying at issue in *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) ("*HathiTrust*"), and *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), qualified as fair use. But the Second Circuit emphasized in *Google* that the facts of that case "test[ed] the boundaries of fair use."[30]

In contrast, the Second Circuit, in *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018), found there was no fair use in TVEyes' unauthorized mass aggregation and licensing of news content.[31] And, more recently, a federal district court in New York found *HathiTrust* and *Authors Guild v. Google* distinguishable where the defendant "convert[ed] [plaintiffs'] books into a digitized form and ma[de] that digitized version accessible to the public," albeit through a purportedly limited-circulation "library" function.[32]

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[29] *Campbell*, 510 U.S. at 577-78.

[30] *Authors Guild v. Google*, 804 F.3d at 206.

[31] 883 F.3d at 182.

[32] *Hachette Book Grp., Inc. v. Internet Archive*, No. 20-cv-4160, 2023 WL 2623787, at *7 (S.D.N.Y. Mar. 24, 2023) (citing *Authors Guild v. Google*, 804 F.3d at 225).

These cases demonstrate that the fair use defense enables courts to consider all the fair use factors and apply them in the context of specific facts. MPA submits that this type of inquiry is the appropriate way to deal with the many types of potential infringements that may arise under the broad umbrella of "training" a generative AI system.

Sweeping generalizations that training is always, or is never, fair use are not helpful. For example, in moving to dismiss a lawsuit brought in the Northern District of California by anonymous individuals, including an author, Google stated that "training Generative AI models on information publicly shared on the internet" categorically is not "copyright infringement."[33] The premise of this argument is that if a copyrighted work is accessible on the internet, it is free for the taking. That premise is flatly wrong and unsupported by case law.[34]

Likewise, in comments before the House Subcommittee on the Courts, Intellectual Property, and the Internet, Sy Damle stated:[35] "Foundational copyright cases establish that the use of copyright-eligible content to create non-infringing works is protected fair use, even if the non-infringing works compete with the originals."[36] That sweeping proposition is fundamentally

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[33] Mot. to Dismiss, *L. v. Google LLC*, No. 3:23-cv-03440-AMO (N.D. Cal. Oct. 16, 2023), Dkt. 20.

[34] *See, e.g.*, *Fox News Network*, 883 F.3d 169 (public accessibility of broadcasts did not determine the fair use analysis).

[35] Mr. Damle testified in his personal capacity. *Artificial Intelligence and Intellectual Property: Part I — Interoperability of AI and Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, at 3 (2023) (statement of Sy Damle) ("Damle Statement"), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/damle-testimony.pdf. He previously served as the Copyright Office's General Counsel and now, in private practice, has represented some of the prominent AI developers and their investors. *See generally* Sy Damle, Latham & Watkins, https://www.lw.com/en/people/sy-damle (last visited Oct. 26, 2023).

[36] Damle Statement at 3; *id.* at 5 ("An unbroken line of cases establishes that the use of a copyrighted work to create a non-infringing final product is quintessential fair use."); *id.* at 7 (similar).

inconsistent with the fact-intensive nature of fair use and is not supported by the case law. These comments cited *HathiTrust*,[37] *Authors Guild v. Google*,[38] and *Sega*.[39] But the courts in those cases did not announce the broad rule for which the comments cite them. On the contrary, the courts found the particular uses in those cases fair only *after* applying the statutory factors to the specific facts before them.

Indeed, other cases have found no fair use when copyrighted materials were used to create allegedly non-infringing works. In *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc*., 342 F.3d 191 (3d Cir. 2003), the Third Circuit concluded it was not fair to use two-minute video clips from Disney movies alongside links to retailers.[40] Similarly, in *Princeton University Press v. Michigan Document Services, Inc*., 99 F.3d 1381 (6th Cir. 1996), and *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014), the appellate courts rejected fair use defenses by parties that were commercially making copies for non-infringing educational use by end users. None of those cases, nor any others, announced a broad per se rule that "the use of copyright-eligible content to create non-infringing works is protected fair use."

The principles that have been recognized for decades in fair use jurisprudence will need to be applied to future cases. For example, noncommercial or nonprofit use will tend to favor a finding of fair use, although courts look past labels to carefully scrutinize the parties and use.[41] Likewise, harm to potential and actual markets weighs against fair use, although certain

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[37] *HathiTrust*, 755 F.3d at 90.

[38] *Authors Guild v. Google*, 804 F.3d at 217-18.

[39] *Sega Enters. Ltd. v. Accolade, Inc*., 977 F.2d 1510, 1514-15 (9th Cir. 1992).

[40] *Video Pipeline*, 342 F.3d at 195, 207.

[41] *Cf. Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1284 (2023) (finding relevant use was "commercial licensing" by AWF, although AWF was a nonprofit).

transformative uses may still be protected.[42] Ultimately, courts will need to decide fair use, weighing all the factors together, based on fully developed records.

> *Question 8.1:* In light of the Supreme Court's recent decisions in *Google v. Oracle America*[43] and *Andy Warhol Foundation v. Goldsmith*,[44] how should the "purpose and character" of the use of copyrighted works to train an AI model be evaluated? What is the relevant use to be analyzed? Do different stages of training, such as pre-training and fine-tuning,[45] raise different considerations under the first fair use factor?

As discussed in response to Question 8, the "purpose and character" of the use of a copyrighted work to train an AI model must be evaluated and weighed together with the other factors: "The Court has cautioned that the four statutory fair use factors may not 'be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.'"[46]

Warhol involved the Andy Warhol Foundation's ("AWF's") commercial licensing of "Orange Prince," an unauthorized derivative work that Warhol created based on a photo of Prince taken and owned by Lynn Goldsmith.[47] The Court's analysis focused on the fact that both works were in the same licensing market, namely, images licensed for use in magazines.

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[42] "[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. . . . [T]he role of the courts is to distinguish between '[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.'" *Campbell*, 510 U.S. at 591-92 (alterations in original) (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

[43] 141 S. Ct. 1183 (2021).

[44] 143 S. Ct. 1258 (2023).

[45] *See* Pre-training, Fine-tuning, and Foundation Models, GenLaw: Glossary (June 1, 2023), https://genlaw.github.io/glossary.html (explaining that pre-training is a relatively slow and expensive process that "results in a general-purpose or foundation model" whereas fine-tuning "adapts a pretrained model checkpoint to perform a desired task using additional data").

[46] *Warhol*, 143 S. Ct. at 1287 (citing *Campbell*, 510 U.S. at 578).

[47] *Id.* at 1268-69.

This key fact was relevant to whether the use was "transformative," and also to whether the use was commercial, notwithstanding AWF's non-profit status.[48] The Court explained that the "central question" in the "transformative" use inquiry is whether the secondary use creates a risk of substitution for either the original work or authorized derivatives.[49] The Court emphasized that while "[m]ost copying has some further purpose, in the sense that copying is socially useful ex post," that fact alone does not make the use fair.[50] Courts must discern "whether *and to what extent*" the purpose or character of the use is different from the original and consider that "degree" in the overall weighing of commerciality, substitution, the goals of copyright, and whether copying is reasonably necessary to achieve the new purpose.[51]

Google LLC v. Oracle America, Inc., involved the particular facts of copying copyrighted software "Application Programming Interface (API)" code.[52] The Court in *Google* evaluated (1) whether the purpose of the use was significantly different from that of the original; and (2) the strength of other justifications for the use.[53] As the Court made clear in *Warhol*, Google "did not hold that any secondary use that is innovative, in some sense . . . is thereby transformative."[54] Rather, Google's copying was deemed fair because, among other reasons, there was no risk of substitution.[55]

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[48] *Id.* at 1273.

[49] *Id.* at 1261, 1274-75, 1277 (citation omitted).

[50] *Id.* at 1275.

[51] *Id.* at 1273-77.

[52] 141 S. Ct. 1183, 1186, 1201-02, 1208-09 (2021).

[53] *Warhol*, 143 S. Ct. at 1277 n.8 (citing *Google v. Oracle*, 141 S. Ct. at 1203).

[54] *Id.* at 1284 n.18.

[55] *Id.* at 1277 n.8 (quoting *Google v. Oracle Am.*, 141 S. Ct. at 1203).

In the AI context, the particular "purpose and use" will vary with the facts of the specific case. Considerations include the particular party using the copyrighted material, the range of training uses (e.g., pre-training, fine-tuning), the materials used for training and their source, and the ultimate intended output. For example, if the party training the AI model intentionally trains on unlicensed copyrighted material, or a source known to consist predominantly of infringing material, that is also relevant. The degree to which these considerations influence the overall fair use analysis will depend on the facts of the case. Several overarching principles likely will be very important to how courts analyze these issues.

First, the relevant "purpose" is that of the party using the copyrighted material. This is important because, in discussing AI, commentators and others often use language that anthropomorphizes the technology, e.g., speaking of the system "memoriz[ing]" or "learning" material.[56] This language has a tendency to confuse the copyright issues. For example, AI jargon may describe wholesale ingestion-copying as "learning," and outputting identical copies as "memorization." This nomenclature cannot obscure that what is taking place is the exercise of the exclusive right of reproduction. More fundamentally, the AI system is not a human being. The system does not have a "purpose," and the use of copyrighted material to train it is not an "educational" use to benefit the AI system. The only relevant purpose is that of the party that uses the copyrighted material to train the system.[57]

Second, the relevant use will vary, both with the stage of training, scope of material used, and ultimate use of the outputs. For example, fine-tuning an AI model, specifically using the

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[56] Somepalli, et al. *Diffusion Art or Digital Forgery? Investigating Data Replication in Diffusion Models*, ResearchGate (Dec. 7, 2022), https://www.researchgate.net/publication/366093127_Diffusion_Art_or_Digital_Forgery_Investigating_Data_Replication_in_Diffusion_Models.

[57] *Cf. Warhol*, 143 S. Ct. at 1284 (relevant use was "commercial licensing" by AWF, not the underlying message by Andy Warhol in creating the art).

library of James Bond movies for the purpose of making a competing movie that appeals to the same audience, likely would weigh against fair use.[58] By contrast, an AI tool that is trained on an author's own copyrighted works but that is specifically designed to detect infringement (e.g., "an AI to recognize an Ariana Grande-like song in order to try to catch infringers of her songs"), more likely would be deemed to be making a fair use.[59]

Third, because the fair use inquiry places a particular emphasis on substitution, a court may look at system owner's end goals, e.g., whether their AI model produces outputs to be sold in competition with the underlying copyrighted works or licensed alternatives.[60]

Ultimately, the question of purpose and character of the use is considered in comparison to the copyright owner's own purpose and uses and alongside the question of whether the use is commercial.[61]

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[58] Notably, the converse is not necessarily true. Simply because an AI model trains on millions or billions of pieces of content, including copyrighted material (like James Bond movies), does not mean that it is not infringing. Courts would need to look at all the facts and weigh the fair use factors together.

[59] Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743, 777 (2021) ("The problem comes when we ask what we want such an AI to do with that information. What is the output of that AI? Some answers won't be worrisome from a copyright perspective. We might train an AI to recognize an Ariana Grande-like song in order to try to catch infringers of her songs, for instance.").

[60] *Id.* ("The purpose to which the ML [Machine Learning] system ultimately puts the information may matter to several of the fair use factors. Some ML systems will be interested in the expressive components of the work as an integral part of their training. That is, the goal will be to teach the system using the creative aspects of the work that copyright values, not just using the facts or the semantic connections the law is not supposed to protect. That is particularly likely of those systems like MuseNet that are training in order to generate their own expressive works. Those ML systems both copy expression for expression's sake and pose a threat of 'significant substitutive competition' to the work originally copied.").

[61] *Warhol*, 143 S. Ct. at 1280 n.13 ("As this opinion makes clear, the commercial character of a secondary use should be weighed against the extent to which the use is transformative or otherwise justified.").

> *Question 8.2*: How should the analysis apply to entities that collect and distribute copyrighted material for training but may not themselves engage in the training?

MPA's response is similar to its response to Question 8.1. The context of the collection and distribution will matter, and a court may properly look to both intermediate and ultimate uses as warranted by the facts of the particular case. To the extent an infringer is simply aggregating works in a way that usurps a copyright owner's right to distribute or license their works, the claim of fair use will be more difficult to make.[62]

> *Question 8.3*: The use of copyrighted materials in a training dataset or to train generative AI models may be done for noncommercial or research purposes.[63] How should the fair use analysis apply if AI models or datasets are later adapted for use of a commercial nature?[64] Does it make a difference if funding for these noncommercial or research uses is provided by for-profit developers of AI systems?

As discussed, the "purpose and character" of the use of a copyrighted work to train an AI model needs to be evaluated holistically and weighed together with the other factors.[65] That said, the Copyright Act expressly mentions the distinction between "whether such use is of a commercial nature or is for nonprofit educational purposes."[66] The fact that a use is for noncommercial purposes is a factor that tends to weigh in favor of fair use. Even a

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[62] *Id.* at 1278 (AWF and Goldsmith's shared purpose in licensing to magazines relevant to lack of transformative purpose and commerciality).

[63] For example, the generative AI model, Stable Diffusion, was reportedly developed in part by researchers at the Ludwig Maximilian University of Munich but is used by the for-profit company Stability AI. *See* Kenrick Cai, *Startup Behind AI Image Generator Stable Diffusion Is In Talks To Raise At A Valuation Up To $1 Billion*, FORBES (Sept. 7, 2022), https://www.forbes.com/sites/kenrickcai/2022/09/07/stability-ai-funding-round-1-billion-valuation-stable-diffusion-text-to-image/?sh=60fe5cad24d6.

[64] 17 U.S.C. § 107(1).

[65] *Warhol*, 143 S. Ct. at 1287 (cautioning "that the four statutory fair use factors may not 'be treated in isolation, one from another'").

[66] 17 U.S.C. § 107(1).

noncommercial purpose in the creation of a work (like Andy Warhol's art) can become a commercial purpose when that work is put to a different use (i.e., licensing to a magazine).

Thus, "for-profit" and "nonprofit" labels are not dispositive. Courts look beyond labels in evaluating and weighing commerciality.[67] "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."[68] In *Warhol*, for example, AWF was a not-for-profit entity, but it most certainly was making a commercial use of Goldsmith's photograph.[69] Likewise, for-profit companies can engage in uses that are determined to be fair (e.g., news reporting).[70]

> *Question 8.4:* What quantity of training materials do developers of generative AI models use for training? Does the volume of material used to train an AI model affect the fair use analysis? If so, how?

MPA does not have specific insight into the volume of material that developers of AI models use. The volume of material used—a large or small amount, and either tailored to a particular set of works or not—may be relevant to the purpose of the use. As discussed above, an AI model trained narrowly and specifically on a particular category of movies (e.g., James Bond) to produce a competing output likely would tip the first factor against fair use. As noted

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[67] As the question suggests, it may be relevant that for-profit companies are funding research or investing in collection of training materials. Stability AI funded the German nonprofit organization, Large-scale Artificial Intelligence Open Network (LAION) that created the training material it used for its AI model. *See* https://github.com/CompVis/stable-diffusion; *see also* Andy Baio, *AI Data Laundering: How Academic and Nonprofit Researchers Shield Tech Companies from Accountability*, WAXY (Sept. 30, 2022), https://waxy.org/2022/09/ai-data-laundering-how-academic-and-nonprofit-researchers-shield-tech-companies-from-accountability.

[68] *Harper & Row*, 471 U.S. at 562.

[69] *Warhol*, 143 S. Ct. at 1280 nn.13 & 14.

[70] *Google LLC v. Oracle Am.*, 141 S. Ct. at 1204 ("There is no doubt that a finding that copying was not commercial in nature tips the scales in favor of fair use. But the inverse is not necessarily true, as many common fair uses are indisputably commercial.").

above, the converse is not necessarily true; if an AI model trained on a very large number of predominantly copyrighted works, that might also weigh against fair use. The volume and specific works used for training would need to be evaluated holistically and weighed together with the other factors relevant to fair use.[71]

> *Question 8.5:* Under the fourth factor of the fair use analysis, how should the effect on the potential market for or value of a copyrighted work used to train an AI model be measured?[72] Should the inquiry be whether the outputs of the AI system incorporating the model compete with a particular copyrighted work, the body of works of the same author, or the market for that general class of works?

The fourth fair use factor, like the other three, must always be weighed together with the other factors.[73] The fourth factor states expressly that it considers "the effect of the use upon the potential market for or value of the copyrighted work."[74] The relevant "market" may vary with the facts.

One potential market is licensing copies of copyrighted works to be used for AI training. This potential market is relevant to the factor four-analysis: because the copyright owner "is entitled to protect his *opportunity* to sell" even if it has not yet been exercised.[75] Another potentially relevant market is that of the outputs generated by AI. If AI systems result in substitution for copies of copyrighted works, that fact is highly relevant to the fourth factor.[76]

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[71] *Warhol*, 143 S. Ct. at 1287 (cautioning "that the four statutory fair use factors may not 'be treated in isolation, one from another'").

[72] 17 U.S.C. § 107(4).

[73] *Warhol*, 143 S. Ct. at 1287 (cautioning "that the four statutory fair use factors may not 'be treated in isolation, one from another'").

[74] 17 U.S.C. § 107(4).

[75] *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d. Cir. 1987) (emphasis added).

[76] *Hachette Book Grp., Inc. v. Internet Archive*, No. 20-cv-4160, 2023 WL 2623787, at *14 (S.D.N.Y. Mar. 24, 2023) ("IA's free library ebook model need not mimic the Publishers' licensing schemes in every respect to provide a significantly competing substitute.").

Finally, 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."[77] Accordingly, courts do not look at the infringer's conduct in isolation; they look more broadly to what would happen if everyone could engage in the same conduct without negotiating a license.

> *Question 9:* Should copyright owners have to affirmatively consent (opt in) to the use of their works for training materials, or should they be provided with the means to object (opt out)?

If the fair use defense does not excuse the exercise of the copyright owner's exclusive rights, the use of the owners' works for training requires affirmative, i.e., *opt-in*, consent. Although litigation involving training materials is pending in the courts, some AI developers have taken steps in the direction of an *opt-out* process.[78] Proposals for opt-out processes present significant challenges for the proper implementation of consent systems and for enforcement of rights under copyright.

As an initial matter, the current proposals for opt-out may prove to be unworkable. There are two types of opt-out: (1) opting out with the AI developer directly, which some AI developers require to be done for each individual piece of content; and (2) tagging the content with metadata so parties know the owner does not consent to training. Because MPA's members' libraries include thousands of works, not to mention promotional and other material,

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[77] *Campbell*, 510 U.S. at 590.

[78] Brooks Testimony at 9. The Head of Public Policy for Stability AI provided congressional testimony regarding "best practices in training" which would include "proactively solicit[ing] opt-out requests from creators." *Id.* Stable Diffusion, going forward, has promised to honor 160 million creator opt-out requests and is "exploring new technical standards for machine-readable opt-outs, so that opt-out metadata follows the content wherever it goes." *Id.*

the sheer scale and volume means these proposed opt-out regimes likely will be insufficient and overly burdensome for the copyright owner. Moreover, such solutions likely will not address the problem of pirated content used as training material.

In general, the AI developer, and not copyright owners, should bear the burden of establishing a high-functioning, accessible, and reliable process for copyright owners to opt out. This is because using others' works to train the AI model benefits the developer of the model. Therefore, if opt-out is required, it must at a minimum (1) allow copyright owners to exercise opt-out at the ownership, not the individual-work, level; and (2) require the AI developer to ensure the opt-out is honored, and not require copyright owners to police the model for individual pieces of content.

> *Question 9.1:* Should consent of the copyright owner be required for all uses of copyrighted works to train AI models or only commercial uses?[79]

As set forth in response to Questions 8 and 8.3, whether the use is of a commercial nature is one, but not the only, consideration in the fair use analysis.[80] Commercial uses in the context of training AI models should not be treated differently than other commercial uses. And, as noted, courts scrutinize the specific facts of the case, not just the "nonprofit" or "for profit"

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[79] For example, the European Union's Directive on Copyright in the Digital Single Market provides for two copyright exceptions or limitations for text and data mining (which may be used in the training of generative AI systems): one for purposes of scientific research and one for any other purpose. The latter is available only to the extent that rightsholders have not expressly reserved their rights to the use of their works in text and data mining. *See* Directive 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, 2019 O.J. (L 130), https://eur-lex.europa.eu/eli/dir/2019/790/oj.

[80] 17 U.S.C. § 107(1) (emphasis added) (evaluating "the purpose and character of the use, including whether such use is of a *commercial nature* or is for nonprofit educational purposes").

label.[81] Regardless of whether a use is commercial or non-commercial, other fair use factors must be considered and "weighed together, in light of the purposes of copyright."[82]

> *Question 9.4:* If an objection is not honored, what remedies should be available? Are existing remedies for infringement appropriate or should there be a separate cause of action?

MPA currently believes that existing copyright law should be up to the task of handling these questions. A copyright owner who establishes infringement should be able to avail itself of the existing available remedies in §§ 502-505, including monetary damages and injunctive relief.

> *Question 9.5:* In cases where the human creator does not own the copyright—for example, because they have assigned it or because the work was made for hire—should they have a right to object to an AI model being trained on their work? If so, how would such a system work?

MPA's members create works that include thousands of contributions. Traditional principles of copyright law give rights only to copyright owners and exclusive licensees to object through enforcing those rights. Those principles have functioned well, and MPA does not currently see any reason to change them in the AI context.[83]

> *Question 10:* If copyright owners' consent is required to train generative AI models, how can or should licenses be obtained?

The Copyright Office has highlighted a number of licensing regimes, including voluntary direct licensing, voluntary collective licensing, compulsory licensing, and extended collective licensing. The preference always should be for voluntary licensing transactions between copyright owners and prospective users. Any variations from traditional direct individual

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[81] *See supra* discussion in response to Question 8.3.

[82] *Campbell*, 510 U.S. at 577-78.

[83] *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1447 (9th Cir. 1994) (discussing scope of the exclusive licensees' right to bring a lawsuit).

licenses should be initiated by and tailored to the needs of the particular copyright owner industry.

At this time, there is no reason to believe that copyright owners and companies engaged in training generative AI models and systems cannot enter into voluntary licensing agreements, such that government intervention might be necessary. In fact, as it relates to certain industries, the emergence of direct voluntary licenses has already occurred because some copyright owners have actively entered into licensing agreements with AI companies. The AI company Bria has a license with Getty Images that gives it rights to the photographs it uses for training.[84] Sam Altman, OpenAI's CEO, told Congress that "OpenAI has had cooperative and productive discussions with creators and creative platforms both about the use of works that could be used to teach AI models, [and] . . . OpenAI has also entered into license agreements to pay for specialized content, such as its partnership with Shutterstock, and it expects to continue to do so in the future."[85] Shutterstock provides stock photographs, illustrations, videos, motion graphics, and music,[86] and its agreement with Open AI provides OpenAI access to Shutterstock's works to train its AI models.[87] OpenAI also entered into an agreement with the Associated Press to access

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[84] Kyle Wiggers, *This Startup Wants to Train Art-Generating AI Strictly on Licensed Images*, TechCrunch (Apr. 13, 2023, 5:30 AM), https://techcrunch.com/2023/04/13/this-startup-wants-to-train-art-generating-ai-strictly-on-licensed-images/. NVIDIA and Getty Images also entered into a partnership to build a generative AI tool that relies only on licensed images. Rick Merritt, *Moving Pictures: NVIDIA, Getty Images Collaborate on Generative AI*, NVIDIA (Mar. 21, 2023), https://blogs.nvidia.com/blog/2023/03/21/generative-ai-getty-images/.

[85] Questions for the Record from Sam Altman to the S. Comm. on the Judiciary, at 10 (June 22, 2023), https://www.judiciary.senate.gov/imo/media/doc/2023-05-16_-_qfr_responses_-_altman.pdf.

[86] *See* Shutterstock, https://www.shutterstock.com (last visited Oct. 26, 2023).

[87] Ben Wodecki, *OpenAI Licenses Shutterstock Data to Train Its AI Models*, AI Business (July 13, 2023), https://aibusiness.com/nlp/openai-licenses-shutterstock-data-to-train-its-ai-models (last visited Sept. 26, 2023).

the news agency's archive of stories.[88] Further, Adobe's Firefly was designed to train "only on licensed images from [Adobe's] own Adobe Stock photography collection"—i.e., it engaged licenses it already had to obtain material for training.[89]

These types of agreements and policies show that market-based solutions, which both respect copyright owners' rights (and provide creators with market-based compensation) and facilitate the training of generative AI models, continue to develop.[90] Therefore, voluntary direct licensing is both feasible and desirable for different industries and for a variety of rights and uses. Copyright policy should support, not undermine, voluntary direct licensing schemes as they develop in the free market.

> *Question 10.1*: Is direct voluntary licensing feasible in some or all creative sectors?

As discussed in response to Question 10, MPA believes that direct voluntary licensing is both feasible and desirable. MPA speaks only on behalf of its members, but the fact that some individual copyright owners and AI companies already are engaged in licensing on an individual basis suggests that voluntary licensing is feasible in various creative sectors.[91]

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[88] Matt O'Brien, *ChatGPT-Maker OpenAI Signs Deal with AP to License News Stories*, APNews (July 13, 2023, 8:41 AM), https://apnews.com/article/openai-chatgpt-associated-press-ap-f86f84c5bcc2f3b98074b38521f5f75a (last visited Sept. 26, 2023).

[89] *Artificial Intelligence and Intellectual Property – Part II: Copyright: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, at 4 (2023) (written testimony of Dana Rao, Executive Vice President, General Counsel, and Chief Trust Officer, Adobe, Inc.), https://www.judiciary.senate.gov/imo/media/doc/2023-07-12_pm_-_testimony_-_rao.pdf.

[90] IBM is working with Adobe and its Firefly AI model to expand its commercial potential. Press Release, IBM Expands Partnership with Adobe to Deliver Content Supply Chain Solution Using Generative AI (June 19, 2023), https://newsroom.ibm.com/2023-06-19-IBM-Expands-Partnership-with-Adobe-To-Deliver-Content-Supply-Chain-Solution-Using-Generative-AI (last visited Oct. 26. 2023).

[91] Altman, *supra* note 85 at 10; Wodecki, *supra* note 87; O'Brien, *supra* note 88.

> *Question 10.2:* Is a voluntary collective licensing scheme a feasible or desirable approach?[92] Are there existing collective management organizations that are well-suited to provide those licenses, and are there legal or other impediments that would prevent those organizations from performing this role? Should Congress consider statutory or other changes, such as an antitrust exception, to facilitate negotiation of collective licenses?

MPA believes that, in the AI context as in others, voluntary direct licensing is usually preferrable. That said, some industries may believe that voluntary collective licensing better serves their needs. If collective licensing is established, that should be done on an opt-in and non-exclusive basis and driven by the needs of the particular industry.[93] At this time, MPA does not believe there is a need for any statutory changes (such as an antitrust exemption). Rather, the potential for different voluntary licensing arrangements should continue to play out in the market.

> *Question 10.3:* Should Congress consider establishing a compulsory licensing regime?[94] If so, what should such a regime look like? What activities should the license cover, what works would be subject to the license, and would copyright

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[92] Collective licensing is one alternative to a direct licensing regime, in which copyright owners negotiate and enter into private agreements on an individual basis. Under a collective licensing arrangement, rights are aggregated and administered by a management organization. The management organization negotiates the terms of use and distributes payment to participating copyright owners. *See* WIPO, WIPO Good Practice Toolkit for CMOs at 6 (2021), https://www.wipo.int/publications/en/details.jsp?id=4561.

[93] One relevant historical example is the role of the Copyright Clearance Center as a solution for businesses looking to make copies of scientific and other academic journals at a time when the legality of that copying under the fair use doctrine was in dispute, and then after such copying was held to be infringing. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 921 (2d Cir. 1994).

[94] A compulsory or "statutory" license allows for certain uses of a copyrighted work "without the consent of the copyright owner provided that the person adhered to the provisions of the license, most notably paying a statutorily established royalty to the copyright owner." Music Licensing Reform: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary, 109th Cong. (2005) (statement of Marybeth Peters, Register of Copyrights), http://copyright.gov/docs/regstat071205.html.

> owners have the ability to opt out? How should royalty rates and terms be set, allocated, reported and distributed?

MPA agrees with the Copyright Office's longstanding position that a compulsory or statutory licensing scheme is "a measure of last resort" that is warranted only if "Congress . . . conclude[s] that there is a compelling public need and that the need is frustrated by market failure."[95] The imposition of a compulsory licensing regime risks putting the government in the position of effectively picking winners and losers in the market. Importantly, any compulsory licensing scheme would "also need to be sufficiently narrow to comply with treaty obligations of the United States."[96]

Market-based licensing for training AI models is feasible and preferrable to a compulsory licensing regime. Indeed, a voluntary direct licensing market already is emerging. There is no reason to turn to compulsory licensing at this time.

Although MPA speaks only for its members in the motion picture industry, those members would vigorously oppose their works being subjected to compulsory licensing mandates. To the extent any such licensing regimes are being considered, they should be at the initiation of a particular industry and narrowly tailored to serve that industry's needs.

> *Question 10.4:* Is an extended collective licensing scheme[97] a feasible or desirable approach?

An extended collective licensing scheme is neither necessary nor desirable for the motion picture industry. Although MPA generally supports initiatives that enable collective

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[95] U.S Copyright Office, Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document ("LIMD Report") 30 (2011), https://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf.

[96] LIMD Report at 30.

[97] "An Extended Collective Licensing scheme is one where a relevant licensing body, subject to certain safeguards, is authori[z]ed to license specified copyright works on behalf of all rights

management organizations to better serve their members on a voluntary, opt-in, and non-exclusive basis, MPA believes that collective licensing should not undermine opportunities for copyright owners to exercise their exclusive rights individually. As with compulsory licensing, extended collective licensing also risks tipping the marketplace scales between copyright owners and those who exploit their works. Such a result would be particularly problematic where AI developers and their investors seek to profit from models and systems that utilize copyrighted works without paying fair compensation to copyright owners. Before serious consideration of an extended collective licensing scheme, even where an industry supports it, there are many practical and technical questions that policymakers would need to study comprehensively.

Question 10.5: Should licensing regimes vary based on the type of work at issue?

MPA is aware that legislation specific to other types of works has been introduced.[98] To the extent legislation or policy toward licensing regimes develops further, those policies should be tailored to, and take into consideration the needs of, the particular industry. One way to ensure that such licensing regimes account for the considerations of the industry is to allow

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holders in its sector (including non-members), and not just members who have given specific permission for it to act." Extended Collective Licensing (ECL) scheme definition, LexisNexis Glossary (2023), https://www.lexisnexis.co.uk/legal/glossary/extended-collective-licensing-ecl-scheme; *see also* Letter from Karyn A. Temple, Acting Register of Copyrights, U.S. Copyright Office, to Rep. Robert Goodlatte, Chair, and Rep. John Conyers, Ranking Member, H. Comm. on the Judiciary (Sept. 29, 2017), https://www.copyright.gov/policy/massdigitization/house-letter.pdf; Letter from Karyn A. Temple, Acting Register of Copyrights, U.S. Copyright Office, to Sen. Charles Grassley, Chair, and Sen. Dianne Feinstein, Ranking Member, S. Comm. on the Judiciary (Sept. 29, 2017), https://www.copyright.gov/policy/massdigitization/senate-letter.pdf.

[98] *See, e.g.*, Protect Working Musicians Act of 2023, H.R. 5576, 118th Cong. § 3(b) (2023) (creating antitrust exemption to allow "Individual Music Creator Owners" to negotiate collectively with "Dominant Online Music Distribution Platform[s]" or "compan[ies] engaged in development or deployment of generative artificial intelligence" regarding the terms on which their music may be distributed).

industries to design their own voluntary licensing regimes. Such policies should not be one-size-fits-all.

> *Question 11:* What legal, technical or practical issues might there be with respect to obtaining appropriate licenses for training? Who, if anyone, should be responsible for securing them (for example when the curator of a training dataset, the developer who trains an AI model, and the company employing that model in an AI system are different entities and may have different commercial or noncommercial roles)?

Transaction costs in the area of intellectual property are a routine cost of doing business, particularly for access to a large amount of content. Those costs are neither new nor unique in the context of training AI models.[99] Such costs may be reduced or ameliorated in many ways, as demonstrated by the fact that voluntary licenses are starting to emerge.[100] Each party making copies, displaying and/or distributing copies, or making derivative works—i.e., any party that seeks to utilize the work in a way that implicates the § 106 rights—should have the responsibility to obtain any necessary licenses.

> *Question 13:* What would be the economic impacts of a licensing requirement on the development and adoption of generative AI systems?

As discussed in response to Question 10, the development and adoption of generative AI systems should evolve as a function of the free market, which includes having those who wish to exploit those systems bear the actual costs of developing them. Innovation is served through robust intellectual property rights. Imposing other licensing requirements, such as a compulsory or extended collective licensing regime, frustrates the free exercise of those rights and adds unnecessary inefficiency to the free market system.

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[99] *See generally* Richard A. Posner, *Transaction Costs and Antitrust Concerns in the Licensing of Intellectual Property*, 4 John Marshall Review of Intellectual Property Law 325 (2004).

[100] *See supra* response to Question 10.

C. Transparency & Recordkeeping (Responding to Questions 15, 16-17)

> *Question 15:* In order to allow copyright owners to determine whether their works have been used, should developers of AI models be required to collect, retain, and disclose records regarding the materials used to train their models? Should creators of training datasets have a similar obligation?

MPA's members understand Question 15 to apply only to "developers of AI models" and "creators of training datasets," i.e., providers offering AI services or systems to the public.

MPA sees benefits in a developer of an AI model keeping and making available appropriate records regarding the materials used to train their models. These records would allow the public and regulators to meaningfully assess the lawfulness as well as the reliability of the developers' activities. Maintenance of such records may also be required because of anticipated litigation.[101]

In all events, MPA's members believe the Copyright Office and policymakers should be thoughtful about the context and nuances of any recordkeeping requirements to ensure that

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[101] The duty to preserve evidence for litigation arises from the common law. *See Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006) ("As soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action."); *Abramowitz v. Inta-Boro Acres Inc.*, No. 98-CV-4139, 1999 WL 1288942, at *3 (E.D.N.Y. Nov. 16, 1999) ("When a party may be deemed to be on notice is a function of the variable chronologies along which issues develop in a law suit. Thus, in one case it may be a discovery request, in another the complaint, in still another correspondence prior to the filing of a complaint, that puts a party on notice that material in its custody is, or reasonably should be considered, admissible evidence which the party has a legal duty to preserve."). In addition, "[a] party may have a statutory, regulatory, or ethical duty to preserve evidence." *Trevino v. Ortega*, 969 S.W.2d 950, 955 (Tex. 1998) (Baker, J., concurring) (collecting cases).

Today, most of the major AI developers are subject to litigation. *See, e.g.*, *Authors Guild v. OpenAI Inc.*, No. 1:23-cv-08292 (S.D.N.Y. filed Sept. 19, 2023); *Chabon v. Meta Platforms Inc.*, No. 3:23-cv-04663 (N.D. Cal. filed Sept. 12, 2023); *L. v. Alphabet Inc.*, No. 3:23-cv-03440 (N.D. Cal. filed July 11, 2023); *Andersen v. Stability AI Ltd.*, No. 3:23-cv-00201 (N.D. Cal. filed Jan. 13, 2023).

policies are narrowly targeted to achieve the desired goal. It is important that any suggested transparency and disclosure requirements not be overbroad in scope. [102]

> *Question 16:* What obligations, if any, should there be to notify copyright owners that their works have been used to train an AI model?

As explained in response to Questions 8-10, an AI developer's exercise of the copyright owners' exclusive rights generally requires consent (unless fair use applies), which would, by necessity, trigger a requirement to request permission from (and thus notify) the relevant copyright owners.[103]

> *Question 17:* Outside of copyright law, are there existing U.S. laws that could require developers of AI models or systems to retain or disclose records about the materials they used for training?

Yes. As explained in response to Question 15, AI developers that are the subject of litigation have preservation and disclosure obligations.[104] In addition, "[s]tate laws such as the California Consumer Privacy Act (CCPA) also require that businesses disclose how they use personal information and regulate when companies may take personal information collected for one purpose and reuse it for another."[105]

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[102] *See infra* discussion in response to Question 28.

[103] Notably, some AI developers have made attempts to address this retrospectively. The website "Have I Been Trained?" discloses what was used in the Stable Diffusion model and Stability AI states that it is working on ways to, in the future, exclude works for which the owners have exercised an opt-out. Brooks Testimony at 9 & n.8.

[104] *See supra* note 101.

[105] William Ridgway, Ken Kumayama & Brian O'Connor, *Data Collection & Management, Professional Perspective - Artificial Intelligence Tools: Privacy Pitfalls*, BLOOMBERG LAW (Aug. 2023), https://www.bloomberglaw.com/external/document/XBLS8B9K000000/data-collection-management-professional-perspective-artificial-i.

D. Copyrightability (Responding to Questions 18-20)

Humans are, and will, remain at the heart of the creative process. At the same time, AI, including potential uses of generative AI as it continues to develop, can be a powerful tool in the hands of human artists and those involved in creating motion pictures to enhance and serve the filmmaking process. MPA supports a robust copyright system that facilitates and provides incentives to create movies, television programs, and other art forms, including by protecting certain works that human creators make with the assistance of tools that may be considered generative AI—in the same way that such principles apply to uses of other technologies that assist creators in realizing their vision. Such works should not be subject to unnecessary and unhelpful registration requirements.

> *Question 18:* Under copyright law, are there circumstances when a human using a generative AI system should be considered the "author" of material produced by the system? If so, what factors are relevant to that determination? For example, is selecting what material an AI model is trained on and/or providing an iterative series of text commands or prompts sufficient to claim authorship of the resulting output?

Yes. AI is a tool that can, and does, assist creators in the creative process. Given that reality, creators who use AI as a tool to assist them with their creation of original expression *do* produce human-authored copyrightable works. As MPA explained in its introductory statement, the Notice of Inquiry's definition of "generative AI" broadly covers many variations of AI technologies, many of which have been in use for many years and should not raise the copyrightability and authorship issues presented by popular prompt-based tools. Unlike the use of AI systems like Midjourney, where the Office has found that the expressive material is created by the machine, 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. Examples include rotoscoping, aging and de-aging an actor, color correcting, detail sharpening, de-blurring, and removing

unwanted objects. Although the Office has recognized the need for a fact-specific inquiry into "how the AI tool operates and how it was used to create the final work" for purposes of copyright law,"[106] the Office's approach to date, including in the Notice of Inquiry definition, fails to account for these nuances.

To analyze whether a work qualifies as a work of human authorship, the Supreme Court has focused on how an author's creative input and "original intellectual conceptions" contributed to the work.[107] But the Copyright Office's recent decisions have moved closer to what amounts to an inflexible rule that focuses on the "predictability" of, and the author's control over, the ultimate output from a creative process that involves AI, or whether the human "actually formed" the image. Such a rule deviates from the principle that the human authorship analysis is inherently a fact-specific inquiry; it also is inconsistent with the fact that a rigid appeal to predictability and control are not universally required for copyrightability (e.g., examples in art, music, photography, and film, as explained more below).

The Office also has modified its copyright registration requirements, now requiring applicants to disclaim AI-generated content that is more than *de minimis*.[108] The Office's position on the copyrightability of AI-generated works and its new registration requirements present significant problems for many industries, including the motion picture industry, and they also are in tension with many aspects of copyright law and with the Office's prior guidance and its Compendium.

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[106] AI Registration Guidance, 88 Fed. Reg. at 16192 n.25.

[107] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) ("*Sarony*").

[108] AI Registration Guidance, 88 Fed. Reg. at 16193 n.40.

In this Section, MPA provides comments on (1) human authorship and copyrightability of works involving the use of generative AI; and (2) registration requirements for such works.

1. The human authorship requirement and copyrightability for works created with the assistance of generative AI

The Notice of Inquiry seeks input regarding the difficult task of determining *when* a human using generative AI is the author of the resulting material. Thus far, the Office's decisions in this area have focused on the human's ability to predict or control the individual outputs from systems like Midjourney.[109] These systems are fundamentally different than the AI tools that MPA's members currently use in the production and post-production process to create indisputably copyrightable motion pictures. Nonetheless, MPA believes the Office's test is overly rigid, as it does not take into account the human creativity that goes into creating a work using AI as a tool. Indeed, as further elaborated below, the Supreme Court's seminal decision on human authorship, *Sarony*, focused on the human's creative contributions, not on predictability and control. Cases will need to be decided on their specific facts. But refocusing on the circumstances surrounding the human's creative process (i.e., *inputs*)—rather than on the generative AI's *output*—is the more appropriate analytical lens.

[109] The Office's registration decisions denying protection for visual works created by a human using generative AI have focused on the degree of control exercised by the human. *See* Letter from U.S. Copyright Office to Van Lindberg, Esq., at 9 (Feb. 21, 2023), *Cancellation Decision re: Zarya of the Dawn (VAu001480196)* ("*Zarya of the Dawn*"), https://www.copyright.gov/docs/zarya-of-the-dawn.pdf (prompts did not "dictate a specific result"); Letter from U.S. Copyright Office Review Board, at 6 (Sept. 5, 2023), *Decision re: Second Request for Reconsideration for Refusal to Register Théâtre D'opéra Spatial (SR # 1-11743923581; Correspondence ID: 1-5T5320R)*, at 3 (Sept. 5, 2023) ("*Théâtre D'opéra Spatial*"), https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf (prompts were not "specific instructions to create a specific expressive result").

(a) The Copyright Office's published registration decisions and guidance

The courts and the Copyright Office have long recognized that only works reflecting human creativity are copyrightable: "courts have uniformly declined to recognize copyright in works created absent any human involvement."[110] The Office's decision in *Thaler v. Perlmutter* was straightforward and correct because the work at issue was created entirely "autonomously by machine," and the registrant admittedly "played no role in using the AI to generate the work,"[111] the Office properly denied registration. *Thaler* therefore was an easy case.

Unfortunately, the Office's recent decisions, *Zarya of the Dawn*[112] and *Théâtre D'opéra Spatial*,[113] as well as its AI Registration Guidance,[114] indicate the Office may be moving toward an inflexible rule that does not properly recognize the extent to which human creativity can be present in a work generated with the use of AI tools.

Zarya of the Dawn. The Office concluded that comic book images that Kristina Kashtanova created using generative AI (prompts and resulting Midjourney images) were not copyrightable. Based on its understanding of Midjourney's functions, the Office concluded that "the information in the prompt may 'influence' [the] generated image, but prompt text does not *dictate* a specific result."[115] The Office refused to register the work because "Midjourney users lack sufficient control over generated images to be treated as the 'master mind' behind them."[116]

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[110] *Thaler v. Perlmutter*, No. 22-1564, 2023 WL 5333236, at *5 (D.D.C. Aug. 18, 2023); *Théâtre D'opéra Spatial*, *supra* at 3.

[111] *Thaler*, 2023 WL 5333236, at *6.

[112] *Zarya of the Dawn*, *supra* at 8.

[113] *Théâtre D'opéra Spatial*, *supra* at 3.

[114] AI Registration Guidance, 88 Fed. Reg. at 16192.

[115] *Zarya of the Dawn*, *supra* at 9 (emphasis added).

[116] *Id.* (emphasis added).

Notably, the Office indicated that Kashtanova "did not submit" the text prompts that were inputted in the application.[117]

Théâtre D'opéra Spatial. The Copyright Office Review Board affirmed the Office's denial of registration for an image that Jason Allen generated with the assistance of Midjourney. Unlike in *Thaler*, where the work was entirely machine-generated, Allen claimed to have input "at least" 624 text prompts to refine the resulting image.[118] The Office and the Board nevertheless concluded the work should not be registered because "Midjourney does not interpret prompts as specific instructions to create a particular expressive result."[119] And "because Midjourney does not treat text prompts as direct instructions users [like Allen] may need to attempt hundreds of iterations before landing upon an image they find satisfactory."[120] In the Board's view, "when an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the 'traditional elements of authorship' are determined and executed by the technology—not the human user."[121] Like Kashtanova, the Board did not have the ability to consider the prompts that Allen used: "Allen declined to disclose any specific prompt on the grounds that 'specific string of prompts and inputs are confidential.'"[122]

AI Registration Guidance. The March 2023 AI Registration Guidance explained how the Office intends to apply the human authorship requirement for AI-generated material. The Office

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[117] *Id.* at 9 n.16 (emphasis added).

[118] *Théâtre D'opéra Spatial*, *supra* at 2, 6.

[119] *Id.* at 6 (quoting Midjourney Prompts Page, https://docs.midjourney.com/docs/prompts (last visited Sept. 26, 2023)).

[120] *Id.* at 7.

[121] *Id.* at 7 (citing AI Registration Guidance, 88 Fed. Reg. at 16192).

[122] *Id.* at 6 n.8.

said it would ask "whether the AI contributions are the result of 'mechanical reproduction' or instead of an author's 'own original mental conception, to which [the author] gave visible form.'"[123] In the Office's view, "when an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the 'traditional elements of authorship' are determined and executed by the technology—not the human user."[124] In the Office's view, "prompts function more like instructions to a commissioned artist—they identify what the prompter wishes to have depicted, but the machine determines how those instructions are implemented in its output."[125]

These decisions and guidance appear to embrace a rigid and formulaic approach to the human authorship requirement for AI-generated works. As Professor Edward Lee explains, the "Copyright Office has adopted a restrictive view of authorship that requires all authors to follow a linear path in lockstep, going from conception of the entire work at time 1 to dictating the production of the specific results at time 2, with no interplay or iterations between the two."[126] Professor Lee further explains that under the Office's "static, rigid view of authorship, creators must avoid randomness, must exercise sufficient control to dictate the specific results in the final work, and must be able to predict ahead of time, at time 1, the specific results that will be produced at time 2."[127]

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[123] AI Registration Guidance, 88 Fed. Reg. at 16192 (quoting *Sarony*, 111 U.S. at 60).

[124] *Id.*

[125] *Id.*

[126] Edward Lee, *Prompting Progress: Authorship in the Age of AI*, 76 Fl. L. Rev. 6 (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4609687.

[127] *See id.* at 6.

MPA is troubled that the Office is moving toward an inflexible rule that will deny registration if human users are not able to predict and control the particular outputs that follow from prompts provided to the AI system, despite extensive human involvement in the creative process.[128] Even if such an approach is appropriate for some uses of "generative AI" systems like Midjourney, the approach should not apply to MPA's members' use of AI as a production and post-production tool. Supreme Court precedent provides a broader conception of human authorship.

(b) The *Sarony* decision

In *Sarony*, the Court announced the ultimate test for human authorship: whether the works in question represent the "original intellectual conceptions of the author."[129] The defendant argued that a photograph was not a "writing" produced by an "author," and therefore was not within the constitutional or statutory scope of copyright protection.[130] In particular, the defendant argued that a photograph "involve[d] no originality of thought or any novelty in the intellectual operation connected with its visible reproduction," but instead merely "reproduc[ed], on paper … the exact features of some natural object, or of some person" in front of the camera.[131]

The Court rejected this argument, holding that elements of the photographer's creative process in setting up and taking the photograph showed the necessary engagement of human

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[128] *See id.* at 16 ("The Office staked out a higher bar of human authorship by requiring human control over the entire creative process, including the creator's prediction of specific results ahead of time, before the final work is produced; the creator's dictation of the specific results; and the creator's avoidance of random elements.").

[129] *Sarony*, 111 U.S. at 58.

[130] *Id*. at 56-58.

[131] *Id*. at 56.

intellect. For example, the photographer "gave visible form" to his work "by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression."[132] The photographer obviously was not the "author" of the specific components of his work that were reproduced on film (Oscar Wilde, his costume, the draperies, etc.), but the Court nevertheless held the work embodied protectable human creativity.

The Court relied on the reasoning of a copyright decision from England. The judge in that case relied on evidence of the human author's role in *orchestrating* the creative process. The Supreme Court quoted the English judge's description of "the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be-the man who is the effective cause of that"; the judge's interpretation of "author" as "originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph"; and the judge's description of an "author" as "the man who really represents, creates, or gives effect to the idea, fancy, or imagination."[133]

Sarony thus makes clear that the human authorship analysis will be fact-specific and will focus on the creative process underlying the work, in particular whether that process includes a human's intellectual contributions. The photographer's creative decisions—including posing the subject in front of the camera, arranging the setting, and controlling the lighting—satisfied the

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[132] *Id*. at 60.

[133] *Id*. at 60-61 (cleaned up).

constitutional and statutory requirement of human authorship.[134] The district court's decision in *Thaler* echoed this core holding of *Sarony*, explaining the "consistent understanding that human creativity is the *sine qua non* at the core of copyrightability, even as that human creativity is channeled through new tools or into new media."[135]

(c) A limited focus on predictability and human control of the output is inconsistent with *Sarony*

The ultimate test for human authorship is whether the work in question is an "original intellectual conception of the author."[136] The Office's reading of *Sarony* as focusing on control and predictability as measured by comparing the *output* to what the putative author intended to create[137] takes too narrow of a view of the Supreme Court's decision. In a fact-specific inquiry, the elements of predictability and control may be appropriate in certain cases. However, the human authorship analysis also must focus on the putative author's creative decisions in providing the *inputs* to the process (and the content of those inputs), which may reflect the human author's intellectual conception. To the extent that predictability and control are relevant

[134] *See id.* at 58 (defining "author" as "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature").

[135] *Thaler*, 2023 WL 5333236, at *3.

[136] *Sarony*, 111 U.S. at 58.

[137] *Id.* at 60; AI Registration Guidance, 88 Fed. Reg. at 16192; *see generally* 88 Fed. Reg. at 16192-16193; *Théâtre D'opéra Spatial*, *supra*; *Zarya of the Dawn*, *supra*. Notably, the focus on predictability and control in *Sarony* appears to be driven by the fact that the work at issue was a photograph that was a near replica of the scene set out before it. The copyrightability of a photograph is not different if it involves less predictability and control, e.g., capturing a fireworks display or a war photojournalist capturing destruction and human suffering.

in the context of a motion picture work, the focus must be on the overall, final motion picture work, not the intermediate material.[138]

The AI Registration Guidance suggests that a human user inputting prompts—no matter the degree or volume of creativity—into a generative AI system would *never* be able to satisfy the human authorship requirement for protection of the output.[139] In reaching that conclusion, the Office relied heavily on the Compendium, including section 312.2 ("Works That Lack Human Authorship"). Section 312.2 provides that "literary, artistic, or musical expression or *elements of selection, arrangement*, etc." are relevant to the "traditional elements of authorship" inquiry.[140] However, the Office's overly formulaic position would ignore that "expression or elements of selection, arrangement" are relevant considerations for authorship.[141] By categorically rejecting human authorship "when an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response," the Office would

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[138] *See* AI Registration Guidance, 88 Fed. Reg. at 16192 n.25 (emphasis added) (explaining that copyrightability for AI-generated material "will depend on the circumstances, particularly how the AI tool operates and how it was used to create the *final* work").

[139] *Id.* at 16193 ("[W]hen an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the 'traditional elements of authorship' are determined and executed by the technology—not the human user.").

[140] U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (3d ed. 2021) ("COMPENDIUM (THIRD)") (emphasis added) (quoting U.S. COPYRIGHT OFFICE, REPORT TO THE LIBRARIAN OF CONGRESS BY THE REGISTER OF COPYRIGHTS 5 (1966)) ("Similarly, the Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author. 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.'").

[141] Lee, *supra* note 126 at 16.

neglect that the human authorship analysis is a fact-specific inquiry that is not susceptible to such bright-line rules.[142]

While not, at this time, relevant to MPA's members' works, it seems likely that as technology continues to improve, prompts inputted into an AI system can become much more detailed; the inputs themselves may provide the substantive content for the output, which means the corresponding outputs can become much more predictable.[143] A rule that prompts would never satisfy the human authorship requirement neglects those likely possibilities. Further, focusing on predictability in outputs places undue weight on the sophistication of the particular AI model, which is unrelated to the author's creative process.[144]

In his testimony to Congress, AI Professor Sag, whose research focuses on AI and copyright law, also recognizes that "there is no reason in principle why prompts couldn't be detailed enough to" satisfy *Sarony*'s human authorship requirement.[145] Professor Sag explained that "'creative input or intervention' comes in many forms and the ultimate test remains whether someone's 'original intellectual conception' is reflected in the final form of the work."[146] In

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[142] *Id.* at 21.

[143] *Cf. id.* at 9-10 (noting the rapid development of AI platforms with new functionalities).

[144] MPA understands the Office's position that it "will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author." *Zarya of the Dawn*, *supra* at 8 (quoting COMPENDIUM (THIRD) § 313.2). Although this position is not controversial, the danger is that the Office does not provide due weight to the context in which works are created and the numerous actions that constitute an author's creative input, as *Sarony* requires, that are intertwined and inseparable from the final work.

[145] *Artificial Intelligence and Intellectual Property – Part II: Copyright and Artificial Intelligence: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary* (2023) (testimony statements of Matthew Sag, Professor of Law in Artificial Intelligence, Machine Learning and Data Science, Emory University School of Law), https://www.judiciary.senate.gov/imo/media/doc/2023-07-12_pm_-_testimony_-_sag.pdf.

[146] *Id.* at 10.

Professor Sag's view, "refining text prompts and choosing between different outputs should also be recognized as way in which a human using Generative AI could meet the authorship standard."[147] This is because "[m]any types of authorship involve generating alternatives and choosing between them."[148]

Professor Sag provided two salient examples. First, in photography, "[t]he author's control over timing and framing are often considered central to the copyrightability of photos. There is really no difference between choosing when to take a photo and selecting one frame out of continuous reel. If that is so, then it makes sense to recognize selection and adoption as indicia of authorship."[149] As a second example, "a painter who flings paint at a canvas and then decides whether to fling more paint, or she 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."[150] These examples highlight that predictability in the output of creative works should not be the sole focus for determining human authorship and copyrightability and that human control can be exercised even through the use of inputs, which may lead to output that is unpredictable at the point of providing the inputs.

In fact, "[t]hroughout history, artists have embraced spontaneity, unpredictability, and randomness in the process of creation."[151] Professor Lee's comprehensive article details a plethora of authorities and well-known examples "recogniz[ing] the important role of serendipity

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[147] *Id.* at 11.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] Lee, *supra* note 126 at 69-75 (collecting sources and examples).

and randomness in the creative process leading to unplanned, and surprising or even novel, results."[152] In art, Jean Arp created a collage with squares arranged according to the law of chance "by tearing paper into pieces, letting them fall to the floor, and pasting each scrap where it happened to land."[153] In music, John Cage embraced chance and indeterminacy in his compositions, which include works he wrote based on randomly generated numbers.[154] In photography, wildlife, nature, and astro-photographers often capture unpredicted elements, including by relying on time-lapse photography, which captures whatever passes in front of the camera.[155] In film, Abraham Zapruder created a 26-second film of the assassination of President John F. Kennedy despite his lack of foresight about what the film would entail, and lack of ability to mastermind, control, or dictate the scenes of the film.[156]

Despite the inability of these authors to completely predict and/or dictate a specific result, as a general matter, their works have been afforded protection. Regulations should be technologically neutral: if the lack of predictability in traditional processes of creating art, music, photographic, and film works do not render these works uncopyrightable, there should be

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[152] *Id.* at 69.

[153] *Id.* at 71; *see also* Victoria & Albert Museum, *Ceramics – a Risky Business*, https://www.vam.ac.uk/articles/ceramics-a-risky-business (last visited Oct. 26, 2023).

[154] Lee, *supra* note 126 at 72.

[155] *Id.* at 73.

[156] *Id.*; *see also id.* at 48 (citing Legislative History of the General Revision of the Copyright Law, Title 17 of the United States Code, and for Other Purposes: P.L. 94-553, 90 Stat. 2541, at 43 (Oct. 19, 1976)) ("The [legislative history of the 1976 Copyright Act] offers the example of a recording of birdcalls. Even though the record producer did not dictate what the birds would chirp, or predict ahead of time the specific sounds or sequence of sounds the birds would make, the Report states that the producer *can* be an author by contributing to the recording of bird calls, such as by selecting which bird calls to include in the final recording, or arranging them in a minimally creative way.").

no reason that the lack of predictability in works created with the assistance of AI tools should do so, if there is sufficient human control.

Consistent with *Sarony*, MPA believes the authorship determination should focus broadly on the human author's overall interaction with the process for creating the work. This directs attention to the human author's creative process and decisions, e.g., how to arrange, select, and position elements of the ultimate work. 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."[157] The same reasoning from *Sarony* can apply to human uses of generative AI: material human creators provide to the AI tool (e.g., inputs, like a drawing or photo), refinements, direction, and then human use of the output all can involve intellectual and creative contributions that are inseparable from the ultimate work.[158] Creators can employ generative AI systems as tools to enhance the creative process, just as they have availed themselves of cameras and Adobe Photoshop and received copyright protection for their works.[159]

This point is particularly important for MPA's members' works. Different from the creation process for other works involving literary, visual, or musical elements, the process of

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[157] *Sarony*, 111 U.S. at 60.

[158] MPA understands that Kris Kashtanova has submitted a new work, "Rose Enigma," for registration, along with an explanation of their process. This may provide the Copyright Office with an opportunity to analyze these questions in the context of 2D visual artwork. *See* Kris Kashtanova (@icreatelife), TWITTER (May 2, 2023, 12:03 PM), https://twitter.com/icreatelife/status/1653475431960530944.

[159] Courts have held that works modified using Adobe Photoshop may be copyrightable. *See etrailer Corp. v. Onyx Enters., Int'l Corp.*, No. 4:17-CV-01284, 2018 WL 746335, at *1-3 (E.D. Mo. Feb. 7, 2018); *Payton v. Defend, Inc.*, No. 15-00238, 2017 WL 6501861, at *3-4 (D. Haw. Dec. 19, 2017); *AI Registration Guidance*, 88 Fed. Reg. at 16193 ("For example, a visual artist who uses Adobe Photoshop to edit an image remains the author of the modified image . . . .").

creating a motion picture is exceedingly complex in the number and types of creative contributions, which in many cases come from the work of thousands of individuals.[160] A major motion picture may include dozens of individuals working in writing and story; the art department; camera and electrical; stunts; sound and music; special effects and visual effects; makeup; animation; costume and wardrobe; production; editing; and more.[161] Many of the individuals working in these and other areas contribute creative elements to the ultimate motion picture. They may use AI technologies, including those that potentially fall under the Notice of Inquiry's broad definition of "Generative AI," as a tool to enhance the expressive material they create. The resulting elements then are interwoven into a single motion picture work.[162]

The fact that creators produced some parts of the film with the assistance of AI should not render those portions uncopyrightable. Such a result would be untenable. Take a hypothetical example of a superhero motion picture. The movie might be copyrighted, but would a scene involving AI-assisted visual effects depicting a battle in space receive the same protection? Can a studio protect its rights if the underlying characters and scene script are protectable, but the visual output that involves the AI-assisted effects is not?

More directly, attempts to disaggregate the portions of the film that were created with the assistance of AI tools from portions that were not would represent a significant departure from

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[160] Stephen Follows Film Data and Education, *How Many People Work on a Hollywood Film?* (Feb. 24, 2014), https://stephenfollows.com/how-many-people-work-on-a-hollywood-film/ (last visited Oct. 10, 2023).

[161] *Id.*

[162] Copyright law recognizes that the motion picture industry is unique in its reliance on so many different individuals and creative elements. For example, the "work made for hire" definition specifically applies to works "specially ordered or commissioned for use," *inter alia* "as part of a motion picture or other audiovisual work." 17 U.S.C. § 101; *see* Copyright Office, Circular 30, Works Made for Hire, https://www.copyright.gov/circs/circ30.pdf.

existing copyright law, which does not inquire into the creative process at the point of determining copyrightability. Rather, such questions are—as they should be—dealt with in the context of analyzing claims of infringement.[163]

2. Registration requirements for works that use generative AI

The Copyright Office stated in the AI Registration Guidance that "AI-generated content that is more than *de minimis* should be explicitly excluded from the application."[164] MPA believes that (1) the Office should not require MPA's members to disclaim aspects or portions of motion pictures that use AI as a tool in the hands of human creators, both because such aspects are copyrightable material, as well as for practical reasons; and (2) the standard for disclaimer, as it relates to purely AI-generated material, should be when the material constitutes an appreciable amount of the whole work rather than the more than *de minimis* standard; the appreciable amount standard is consistent with the Compendium.

(a) The Office's registration requirements do not apply to MPA's members' uses of AI; applying those requirements to MPA's members' uses would have significant, negative real-world consequences

Requiring the creators of motion pictures to disclaim the use of generative AI is unworkable, because it is inconsistent with the copyrightability of those works, and would have significant, negative practical consequences.

First, the AI Registration Guidance and the Notice of Inquiry's broad definition of "generative AI" is unworkable because it potentially encompasses a wide range of AI

[163] For example, the Ninth Circuit standard for substantial similarity requires the application of an extrinsic test that filters out unprotectible elements to determine if the protectible elements of two works are substantially similar. *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072, 1076-77 (9th Cir. 2006).

[164] AI Registration Guidance, 88 Fed. Reg. at 16194.

technologies, including tools that MPA's members have routinely used for many years in the production and post-production processes.

The Office's discussions of generative AI fail to differentiate between generative AI where the expressive material is created by the AI model (e.g., Midjourney), and the routine use of production and post-production AI tools that could fall under the Office's broad definition of "Generative AI." Moreover, the Office's discussions sometimes actively conflate these very different types of AI uses.

During its June 28, 2023 webinar Registration Guidance for Works Containing AI-Generated Content, the Office provided an example of AI that removes mud from a performer's clothing in successive frames of a motion picture.[165] That type of AI is not the same as generative AI models like Midjourney, because the "AI" is not generating the expressive material; rather the AI is merely assisting with post-production enhancements to existing expressive material. While the Office stated that such use of AI did not need to be disclaimed, the rationale given was not that the AI was not "generative AI," but that such post-production uses (like removing mud from several frames of a movie) is "de minimis," i.e., the AI-generated elements would not have been independently copyrightable had they been performed by a human.[166] This raises the possibility that the use of such non-generative AI may need to be disclaimed if it were used in a way that generated copyrightable elements of the film.

In the motion picture industry, AI is more typically a component of various tools that skilled creative professionals use to enhance the filmmaking process, including during production and post-production, as explained above in MPA's Preliminary Comments and in

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[165] June 28 Webinar Tr. at 7.

[166] *Id.*

response to Question 2 and *supra*. There should be no doubt that MPA's members' uses of AI in this manner do *not* render material unclaimable and thereby trigger the need to disclaim. Indeed, the Office appears to recognize that "technological tools can[] 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."[167] The Office also recognizes that "[m]any technologies are described or marketed as 'artificial intelligence,' but not all of them function the same way for purposes of copyright law," thus requiring a fact-specific approach that examines "how the AI tool operates and how it was used to create the final work."[168] As the Office explained, "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."[169]

The tools used in post-production by MPA's members, for example, are analogous to creators using traditional Photoshop tools. This is true *even if* the tool could be characterized as "generative AI" under the Office's broad definition. Creators' routine use of tools that incorporate AI technology should not render parts of a motion picture uncopyrightable or trigger the need to disclaim certain elements of a motion picture in an application. These results would disincentivize creators from using helpful technological tools to effectuate their creative vision and from creating technologically advanced content that is more appealing to the public. MPA's members' works are copyrightable. MPA asks the Copyright Office to make this clear: when technologies are used by humans as tools to, for example, recast or adapt material during the creative process, that material does *not* need to be disclaimed.

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[167] AI Registration Guidance, 88 Fed. Reg. at 16193.

[168] *Id.* at 16192 n.25.

[169] *Id.* at 16193.

Second, requiring MPA members to disclaim such material would have significant, negative real-world consequences. There is a practical issue that any motion picture will have countless elements, including those created with the assistance of AI tools. As discussed, motion pictures often involve *thousands* of individuals working on *countless* creative elements that are all ultimately interwoven into a single motion picture work. Attempting to disaggregate and/or keep records regarding how AI is used across all of these elements creates an unwieldy and unnecessary burden. This is particularly true at the registration stage. (As discussed in response to Question 28, MPA does not believe disclosure requirements should apply to creative industries' use in connection with their own copyrighted works.)

Third, as noted in response to Question 2, infringers will use any opportunity to undercut a claim of copyright infringement by purporting to find fault in the registration process. Defendants could cause mischief by challenging the validity of registrations on the ground that the applications improperly failed to disclaim AI generated material, even where that AI-generated material clearly reflects the creative intent of a human artist. This includes expanding the use of § 411(b)(2) referrals,[170] which complicate and frustrate civil enforcement actions.

For example, on April 27, 2023, less than two months before the trial scheduled in *Hayden v. 2K Games, Inc.*, the court issued an order to show cause why the issue of supplemental registrations should not be referred to the Register of Copyrights.[171] While the Office responded promptly, the trial was taken off calendar and will not be reset until 2024.[172] Even if the referral lacks merit, the referral delays enforcement of the copyright owners' rights.

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[170] 17 U.S.C. § 411(b)(2).

[171] Order, *Hayden v. 2K Games, Inc.*, No. 1:17-cv-02635 (N.D. Ohio, Apr. 27, 2023), Dkt. 217.

[172] Order, *Hayden*, No. 1:17-cv-02635 (Sept. 19, 2023), Dkt. 236.

The tactic of seeking referral could wreak real havoc if raised in a mass piracy case involving hundreds, or more, of MPA's members' works. Potentially worse, an omission can result in a court "disregard[ing] a registration in an infringement action pursuant to section 411(b) of the Copyright Act if it concludes that the applicant knowingly provided the Office with inaccurate information."[173] The result is inefficient for the Office and the courts and does not serve copyright's ultimate goals. To the extent an infringement case involves a question of whether AI-generated material can be protected by copyright, that question should not be resolved as a technical matter of compliance with a registration requirement, but rather by the court applying the human authorship standard.

(b) The need to adhere to the Compendium's "appreciable portion of the work as a whole" standard for purely AI-generated material

Consistent with the Compendium's guidance, MPA believes that the Copyright Office should apply the "appreciable portion of the work as a whole" standard for disclaiming of AI-generated material rather than the unmoored "more than *de minimis*" (or *Feist* copyrightability) standard, which poses significant issues for MPA's members.

The more-than-*de-minimis* standard is unclear and difficult to apply. Notably, during the June 28 webinar, the Office stated that material would need to be disclaimed if "standing on its own [it would] be sufficient to satisfy the *Feist* copyrightability standard if it had been created by a human author."[174] If a set designer included an AI-generated painting in the background of a scene, the painting would be a work that, standing on its own, would meet the *Feist* standard of "at least some minimal degree of creativity," but its use in the background of a scene for a matter of seconds during a two-hour long motion picture also would be *de minimis*. There are many

[173] AI Registration Guidance, 88 Fed. Reg. at 16193.

[174] June 28 Webinar Tr. at 2 (citing *Feist*, 499 U.S. at 345).

similar examples: (1) a short commercial "jingle" on a TV playing in a scene of a motion picture; (2) the cover of a scientific textbook that is visible in the background of a scene from a motion picture involving an education setting; or (3) actors playing a board game created for purpose of the motion picture. The jingle, textbook, and board game all could be standalone works, but none constitutes an appreciable amount of the work as a whole. If such elements were licensed for use in the motion picture, the Office would not require that they be disclaimed. The standard should not be different simply because AI might be involved.

MPA reiterates that requiring disclaimers for the presence of more than *de minimis* AI-generated content will potentially result in significant changes to the registration process. Among other things, that process would inquire into the details of the author's creative process. It also would usurp the role of the courts in determining questions of copyrightability.

The Compendium makes clear that the "appreciable portion of the work as a whole" standard is the correct and applicable standard for disclaimer.[175] The current version of the Compendium[176] provides guidance regarding registration of copyrighted works in accordance

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[175] As *Feist* noted, the test of whether a work shows more than a *de minimis* amount of creativity erects a low bar to copyrightability. *Feist*, 499 U.S. at 363. In contrast, the test of whether material constitutes an "appreciable amount" of a work sets a higher bar. In the Second Edition of the Compendium, the Office used "substantial amount" instead of "appreciable amount," and required an application to disclaim if the new work contained "substantial amounts of previously registered, previously published, or public domain material." *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 626.02 (2d ed. 1988). The Compendium defined "substantial" to mean that the preexisting material represents, "in relation to the work as a whole," a "significant portion of the work." *Id*. § 325.01(B). The Office has stated that the appreciable amount standard is equivalent to the substantial amount standard. Compendium of U.S. Copyright Office Practices, 82 Fed. Reg. 45625, 45626 & n.2 (Sept. 29, 2017).

[176] "The *Compendium* documents and explains the many technical requirements, regulations, and legal interpretations of the U.S. Copyright Office." COMPENDIUM (THIRD) at 1. The Compendium "provides guidance regarding the contents and scope of particular registrations and records" and "explain[s] the legal rationale and determinations of the Copyright Office, where applicable, including circumstances where there is no controlling judicial authority." *Id.* at 1-2. Courts

with U.S. copyright law.[177] Section 621.2 instructs that "[u]nclaimable material should be disclaimed only if it represents an *appreciable portion of the work as a whole*."[178] During the webinar, the Office repeatedly drew from the Compendium and recognized this standard, explaining that "[a]s our policy statement on March 16 made clear, there is a duty to disclose if there is an appreciable amount of AI generated content in a work."[179] The Compendium already sets forth the framework for authors to apply the "appreciable portion of the work as a whole standard." MPA urges the Office to adhere to that standard should disclaimers for AI-assisted content be required during the registration process. MPA respectfully submits that no compelling policy reason has been articulated for adopting a stricter standard for what must be disclaimed when material is the result of generative AI than for other unclaimable material that may be incorporated into a work. The Office should strive to adopt predictable, technologically neutral standards with general applicability.

> *Question 19:* Are any revisions to the Copyright Act necessary to clarify the human authorship requirement or to provide additional standards to determine when content including AI-generated material is subject to copyright protection?

As explained above, existing law, which follows the Supreme Court's seminal decision in *Sarony*, is capable of addressing whether AI-generated material can satisfy the human authorship requirement.

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hearing copyright cases, including the Supreme Court and the Ninth Circuit, have routinely "drawn upon the Compendium for guidance." *See, e.g.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 422 (2017); *Gray v. Hudson*, 28 F.4th 87, 100 n.8 (9th Cir. 2022); *see also* COMPENDIUM (THIRD) at 2 (collecting cases).

[177] COMPENDIUM (THIRD) § 303.

[178] *Id.* § 621.2 (emphasis added).

[179] June 28 Webinar Tr. at 2 ("[I]f a work contains AI generated content, then as a general rule, that content should be disclosed in the registration application if it constitutes an appreciable part of the work."); *see generally id.* at 1-11.

> *Question 20:* Is legal protection for AI-generated material desirable as a policy matter? Is legal protection for AI-generated material necessary to encourage development of generative AI technologies and systems? Does existing copyright protection for computer code that operates a generative AI system provide sufficient incentives?

As explained above, AI is a powerful tool that can be used to enhance the studios' filmmaking process. A robust copyright system that protects certain works generated by creators with the assistance of AI (excluding works that are purely AI generated, like the work in *Thaler*) is necessary to incentivize the creation of movies, television programs, and other art forms.

E. Infringement (Responding to Questions 22-25.1)

> *Question 22:* Can AI-generated outputs implicate the exclusive rights of preexisting copyrighted works, such as the right of reproduction or the derivative work right? If so, in what circumstances?

Likely yes. There are at least two potential scenarios that implicate traditional principles of copyright law.[180]

First, if a pre-existing copyrighted work is copied to train an AI model, and then the AI system outputs a substantially similar copy, that scenario would present a clear case of infringement of the reproduction right. This phenomenon, known as "memorization"[181] or "overfitting,"[182] occurs in the real world. This result "is more likely when: models are trained on many duplicates of the same work; images are associated with unique text descriptions; and

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[180] "The owner of a copyright has the exclusive right to—or to license others to—reproduce, perform publicly, display publicly, prepare derivative works of, and distribute copies of, his copyrighted work. To establish infringement of copyright, 'two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.'" *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 117 (2d Cir. 2010) (citing *Feist*, 499 U.S. at 361); *see, e.g.*, *Harper & Row*, 471 U.S. at 548.

[181] Sag, *supra* note 145 at 5.

[182] *What Is Overfitting?*, IBM, https://www.ibm.com/topics/overfitting (last visited Oct. 29, 2023); *What Is Overfitting?*, Amazon, https://aws.amazon.com/what-is/overfitting (last visited Oct. 29, 2023).

the ratio of the size of the model to the training data is relatively large."[183] Professor Sag has noted that this happens with Stable Diffusion, "when the same text descriptions are paired with duplicates of images, *or relatively simple images that vary only slightly*." Professor Sag explains that this makes infringement more common with copyrightable characters, a result he refers to as "the Snoopy problem."[184] As a matter of practice, this significantly increases the likelihood of infringement for many of MPA's members' valuable characters, e.g., superheroes or cartoon characters with distinctive names, the use of which in prompts can increase the likelihood of infringing outputs. The instances of such infringements are likely to vary, depending on the AI model and a number of other factors.[185]

Second, users' prompts to AI systems may result in AI-generated outputs being unauthorized derivative works.[186] This may occur because the AI model was trained on the pre-existing work. Even if the AI model created "guardrails" to prevent requests for the specific titles of copyrighted works to avoid blatant infringement, those guardrails may be circumvented through tailored prompts.[187] In either case, the output would implicate the copyright owner's exclusive right to create derivative works.

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[183] Sag, *supra* note 145 at 5 & n.20.

[184] *Id.* at 20 n.72.

[185] Researchers attempting to quantify this noted, that while an underestimate, approximately 1.88% of random generations using Stable Diffusion were identifiable reproductions of copyrightable works. Somepalli, *supra* note 56 at 10.

[186] A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. 17 U.S.C. § 101.

[187] *See* Compl. ¶ 73, *Concord Music Grp., Inc. v. Anthropic PBC*, No. 3:23-cv-01092 (M.D. Tenn. Oct. 18, 2023), Dkt. 1 (alleging that, "when Anthropic's Claude [sic] queried, '[w]rite me a song about the death of Buddy Holly,' the AI model responds by generating output that copies directly from the song 'American Pie' written by Don McLean, in violation of Universal's

As discussed more below, the nature of the potential liability would depend on the facts. One may be directly liable for infringement by "violat[ing] any of the exclusive rights of the copyright owner."[188] And, as the Supreme Court has explained, "doctrines of secondary liability . . . are well established in the law."[189] One may infringe contributorily by "ha[ving] knowledge of another's infringement and . . . either (a) materially contribut[ing] to or (b) induc[ing] that infringement,"[190] or infringe "vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."[191]

> *Question 23:* Is the substantial similarity test adequate to address claims of infringement based on outputs from a generative AI system, or is some other standard appropriate or necessary?

The substantial similarity test[192] should be adequate, but litigation developments will provide more information on this question.

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copyright, despite the fact that the prompt does not identify that composition by title, artist, or songwriter").

[188] 17 U.S.C. § 501(a).

[189] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). Indeed, the Supreme Court, citing "principles recognized in every part of the law," first held that secondary liability doctrines apply in copyright law over a century ago. *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911).

[190] *Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 831 (9th Cir. 2019).

[191] *Grokster*, 545 U.S. at 930.

[192] If the AI-generated output is identical in whole or part, there is not a need for courts to analyze substantial similarity. *See Range Road Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1154 (9th Cir. 2012) ("'Substantial similarity' is not an element of a claim of copyright infringement. Rather, it is a doctrine that helps courts adjudicate whether copying of the "constituent elements of the work that are original" actually occurred when an allegedly infringing work appropriates elements of an original without reproducing it *in toto*.").

Notably, the substantial similarity test varies for different works,[193] and also from circuit to circuit. For example, the Ninth, Fourth, and Eighth Circuits apply a two-part extrinsic and intrinsic test.[194] The extrinsic test requires analyzing the objective similarity of expressive elements (like plot, themes, mood, setting, pace, characters, and sequence of events) *after* filtering out unprotectible elements (like ideas, facts, scènes à faire, and public domain material).[195] The intrinsic test, which is reserved for the jury's decision, looks to the overall concept and feel of two works and whether the reasonable observer would find the two works to be substantially similar.[196] The Second, First, Third, Fifth and Seventh Circuits apply the ordinary observer test,[197] or if some elements are unprotectible, the "more discerning ordinary observer" test.[198] Courts applying the latter test "must analyze the two works closely to figure out in what respects, if any, they are similar, and then determine whether these similarities are due to protected aesthetic expressions original to the allegedly infringed work, or whether the

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[193] MPA's members works are typically evaluated using the test that applies to literary works. This test examines similarities in terms of plot, themes, mood, setting, pace, characters, and sequence of events. Cases involving musical works look at musical elements as well as lyrical similarities. *See, e.g.*, *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004). Cases involving visual art looks at subject, pose, shapes, colors, materials, perspective, style, definition, lighting. *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987).

[194] *Shaw v. Lindheim*, 919 F.2d 1353, 1356-57 (9th Cir. 1990); *Towler v. Sayles*, 76 F.3d 579, 583 (4th Cir. 1996); *Designworks Homes, Inc. v. Thomson Sailors Homes, L.L.C.*, 9 F.4th 961, 963-64 (8th Cir. 2021); *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 848 (9th Cir. 2012).

[195] *See, e.g.*, *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822-23 (9th Cir. 2002).

[196] *See, e.g.*, *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 985 (9th Cir. 2017).

[197] *See, e.g.*, *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); *Repp v. Weber*, 132 F.3d 882, 889 (2d Cir. 1997); *Harney v. Sony Pictures Television, Inc.*, 704 F.3d 173, 179 (1st Cir. 2013); *Tanksley v. Daniels*, 902 F.3d 165, 173 (3d Cir. 2018); *Peel & Co. v. Rug Mkt.*, 238 F.3d 391, 398 (5th Cir. 2001); *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1101 (7th Cir. 2017).

[198] *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 130, 134-35 (2d Cir. 2003).

similarity is to something in the original that is free for the taking."[199] These tests should reach the same result if presented with the same facts in different circuits.

MPA is monitoring case developments in this area.

> *Question 24:* How can copyright owners prove the element of copying (such as by demonstrating access to a copyrighted work) if the developer of the AI model does not maintain or make available records of what training material it used? Are existing civil discovery rules sufficient to address this situation?

Courts (and litigants) should be able to handle the element of copying. The ongoing litigation against AI developers implicates preservation obligations.[200] As those cases proceed, the information produced (or not produced) in discovery should help to inform an evaluation of whether additional preservation obligations are required. Notably, if an AI developer has an obligation to preserve, but fails to preserve, relevant evidence regarding training material, rules regarding evidentiary sanctions may apply. Federal Rule of Civil Procedure 37(e) allows a court to make appropriate orders to cure any prejudice to the other party for "fail[ure] to take reasonable steps to preserve [evidence]" that "cannot be restored or replaced through additional discovery." This includes an "instruct[ion] [to] the jury that it may or must presume the information was unfavorable to the party" or even entry of "default judgment."[201] Courts have broad discretion in this area that could extend, in appropriate circumstances, to an inference of copying.[202]

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[199] *Id.*

[200] *See supra* note 101 (regarding duty to preserve evidence).

[201] Fed. R. Civ. P. 37(e)(2).

[202] *See, e.g.*, *Barbera v. Pearson Educ., Inc.*, 906 F.3d 621, 628 (7th Cir. 2018) (affirming decision to accept as true, in order to cure prejudice, certain facts about the contents of deleted emails); *Porter v. City & Cnty. of S.F.*, No. 16-cv-03771, 2018 WL 4215602, at *4 (N.D. Cal. Sept. 5, 2018) (allowing jury to hear short factual statement explaining that the spoliating party erased evidence of a phone call despite its duty to preserve).

Even absent discovery, access may be proved through circumstantial evidence given the manner in which AI training sets are compiled. For example, the LAION database includes over two billion images that were scraped from websites (including those that feature pirated copyrighted material) and ingested into AI models.[203] Such distinct facts may be circumstantial evidence that the particular copyrighted work was infringed.[204] Other facts may also give rise to an inference of copying, for example, the use of Getty Images watermarks identified in Stable Diffusion outputs, as alleged in *Getty Images (US)*, *Inc. v. Stability AI, Ltd*.[205] Further, proof of access may not be necessary if the plaintiff can show striking similarity, which justifies a rebuttable inference of access.[206]

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[203] Somepalli, *supra* note 56 at 3.

[204] *Cf.* Class Action Compl. ¶ 95, *Authors Guild v. OpenAI Inc.*, No. 1:23-cv-03892 (S.D.N.Y. Sept. 19, 2023), Dkt. 1 (citing Alex Hern, *Fresh Concerns Raised over Sources of Training Material for AI Systems*, THE GUARDIAN (Apr. 20, 2023), https://www.theguardian.com/technology/2023/apr/20/fresh-concerns-training-material-ai-systems-facist-pirated-malicious) (Allegations include: "Common Crawl is a vast and growing corpus of 'raw web page data, metadata extracts, and text extracts' scraped from billions of web pages. It is widely used in 'training' LLMs, and has been used to 'train,' in addition to GPT-N, Meta's LlaMa, and Google's BERT. It is known to contain text from books copied from pirate sites."); Class Action Compl. ¶ 87; *L. v. Alphabet Inc.*, No. 3:23-cv-03440 (N.D. Cal. July 11, 2023), Dkt. 1 (citing Kevin Schaul et al., *Inside the Secret List of Websites that Make AI like ChatGPT Sound Smart*, WASH. POST (Apr. 19, 2023), https://www.washingtonpost.com/technology/interactive/2023/ai-chatbot-learning) (Allegations include: "Google's C-4 dataset also reflects the Company's deliberate receipt of stolen property to build and train Bard. The dataset contains data from 'b-ok.org' a 'notorious market for pirated e-books,' as well as '[a]t least 27 other sites identified by the U.S. government as markets for piracy and counterfeits.'").

[205] *See generally* First Am. Compl., *Getty Images (US), Inc. v. Stability AI, Ltd.*, No. 1:23-CV-00135 (D. Del. Mar. 29, 2023), Dkt. 13.

[206] *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 52 F.4th 1054, 1084 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 2583 (2023); *Malibu Textiles, Inc. v. Label Lane Int'l, Inc.*, 922 F.3d 946, 952 (9th Cir. 2019); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1170 (7th Cir. 1997).

> *Question 25:* If AI-generated material is found to infringe a copyrighted work, who should be directly or secondarily liable—the developer of a generative AI model, the developer of the system incorporating that model, end users of the system, or other parties?

Existing liability doctrines establish a general, well-accepted framework for analyzing claims of direct and secondary copyright infringement in the context of new technologies.

As explained above, a party is directly liable for infringement if the party "violate[s] any of the exclusive rights of the copyright owner."[207] Secondary liability applies to those who "have knowledge of another's infringement and . . . either (a) materially contribute to or (b) induce that infringement,"[208] or infringe "vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."[209] Infringers are held jointly and severally liable for damages.[210]

A precise determination of which parties are directly and/or secondarily liable will depend on the facts, but courts have previously applied traditional copyright principles to new technologies and should be able to do the same here. For example, in *American Broadcasting Cos. v. Aereo, Inc.*, 573 U.S. 431 (2014), the defendant was directly liable for providing technology that enabled infringing streams to its customers.[211] In *Grokster*, the defendant was secondarily liable for operating a peer-to-peer service that intentionally induced unauthorized

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[207] 17 U.S.C. § 501(a). Direct infringement includes those responsible for the infringement: "infringement by authorization is a form of direct infringement[.]" *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 970 (9th Cir. 1992).

[208] *Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 831 (9th Cir. 2019).

[209] *Grokster*, 545 U.S. at 930.

[210] 17 U.S.C. § 504(c).

[211] *See also Capitol Record, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 657 (S.D.N.Y. 2013) (rejecting arbitrary human-robot distinction and imposing direct liability where defendant's "founders programmed their software to choose copyrighted content"), *aff'd*, 910 F.3d 649 (2d Cir. 2018).

copying.[212] Copyright owners may bring infringement claims against more than one defendant, and courts will be in a position to apply doctrine to facts.

> *Question 25.1:* Do "open-source" AI models raise unique considerations with respect to infringement based on their outputs?[213]

No. Just as peer-to-peer technologies may be operated by different parties for different purposes, courts will be able to address infringement in the context of "open source" AI models.[214]

F. Labeling or Identification (Responding to Questions 28 & 28.2)

> *Question 28:* 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?

MPA's members oppose any requirement to label or disclose when their works include the use of AI-generated material for expressive and entertainment purposes. Such a requirement would hinder creative freedom.[215] That is very different, of course, than labeling and identification requirements to avoid consumer deception in the context of uses of AI that are intentionally designed to deceive or mislead for political or other reasons.

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[212] *See also Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020, 1026 (9th Cir. 2013) (similar for torrent website).

[213] Some AI models are released by their developers for download and use by members of the general public. Such so-called "open-source" models may restrict how those models can be used through the terms of a licensing agreement. *See, e.g.*, Llama 2 Community License Agreement, Meta AI (July 18, 2023), https://ai.meta.com/llama/license (requiring users of Llama 2 AI model to include an attribution notice and excluding use in services with greater than 700 million monthly active users).

[214] *Cf. Grokster*, 545 U.S. 913; *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1026 (9th Cir. 2013).

[215] As discussed in response to Question 18, the Copyright Office has not previously required applicants to disclose and disclaim AI-generated material as part of the copyright registration process. MPA does not believe it would be appropriate for the Copyright Office to subject the creative industries to these unnecessary requirements.

Copyright law does not provide any basis for requiring that creative industries label AI-generated works. A law requiring creative industries to label such works would be in tension with the companies' constitutional rights, because it would constitute a content-based restriction on speech.

The Supreme Court has held that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."[216] "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."[217] As such, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech"—irrespective of whether the compelled statements involve opinion or fact.[218] Content-based regulations "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[219] Such regulations are subject to strict scrutiny.[220]

A law requiring creative industries to label their works to disclose AI-generated material would likely be subject to strict scrutiny because not only would it alter the content of the speech, it would also regulate works based on the nature of expression contained within them. Such regulation could not "be 'justified without reference to the content of the regulated speech,'" and therefore would be subject to strict scrutiny.[221]

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[216] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

[217] *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 782 (1988).

[218] *Id.* at 795, 798.

[219] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

[220] *Id.* at 163-64.

[221] *Id.* at 164 (quoting *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989)).

It seems very unlikely that a general labeling requirement applied to the creative industries would survive strict scrutiny because the interests at stake are neither sufficiently compelling nor narrowly tailored.[222] For example, there is no good reason that a producer of a superhero movie should need to disclose that certain material or elements in the movie were created by or with the assistance of AI. This type of labeling interferes with the viewer experience, by mandating speech about the process used to create the content that appears on screen, and it would hinder creative freedom. 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 want to convey.[223] Likewise, courts have rejected certain challenges to media and entertainment companies' decisions regarding labels and disclaimers in other contexts, such as ratings of movies, information regarding the credits of a particular work, and closed captioning.[224]

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[222] *Id.* at 163.

[223] 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*, 487 U.S. at 798-99 (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 "exacts 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).

[224] *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 423 (9th Cir. 2014) ("Even if GLAAD does not request any changes to the substantive content of CNN's online news videos, GLAAD, by its own admission, seeks to change the way CNN has chosen to report and deliver that news content by imposing a site-wide captioning requirement on CNN.com. In doing so, GLAAD targets conduct that advances and assists CNN in exercising its protected right to report the news."); *Forsyth v. Motion Picture Ass'n of Am., Inc.*, No. 16-cv-00935, 2016 WL 6650059, at *2 (N.D. Cal. Nov. 10, 2016) (movie ratings are speech in connection with an issue of public interest, as they "speak generally to the content of movies and their suitability for different audience"); *Kronemyer v. Internet Movie Data Base, Inc.*, 150 Cal.

Of course, Congress and regulatory agencies may properly assess a need to protect consumers against deceptive and actively misleading uses of AI (although this is not an issue of copyright law).[225] The FTC has identified "examples of fake new songs supposedly from recording artists, as well as new books sold as if authored by humans but in fact reflecting the output of large language models" and stated clearly that "[c]ompanies deceptively selling such content to consumers are violating the FTC Act."[226] As such, the agency warns that "[i]t's not unusual for the FTC to sue when sellers deceive consumers about how products were made."[227] Notably, apart from regulation, technologies are emerging that help to identify such misleading material.[228]

App. 4th 941, 944, 947 (2007) (holding that the defendant's refusal to list plaintiff's name in credits was an act in furtherance of the defendant's free speech right not to speak).

[225] A handful of states have passed "Deep Fake" or Synthetic Media Laws. *See* Cyber Civil Rights Initiative, https://cybercivilrights.org/deep-fake-laws (last visited Oct. 29, 2023) (collecting laws).

[226] Michael Atleson, *Can't Lose What You Never Had: Claims About Digital Ownership and Creation in the Age of Generative AI*, FTC BUS. BLOG (Aug. 16, 2023), https://www.ftc.gov/business-guidance/blog/2023/08/cant-lose-what-you-never-had-claims-about-digital-ownership-creation-age-generative-ai.

[227] *Id.* The FTC has opined in a blog post that "[t]he FTC Act's prohibition on deceptive or unfair conduct can apply if you make, sell, or use a tool that is effectively designed to deceive – even if that's not its intended or sole purpose." Michael Atleson, *Chatbots, Deepfakes, and Voice Clones: AI Deception for Sale*, FTC BUS. BLOG (Mar. 20, 2023), https://www.ftc.gov/business-guidance/blog/2023/03/chatbots-deepfakes-voice-clones-ai-deception-sale; *see also Young v. NeoCortext, Inc.*, No. 2:23-cv-02496, 2023 WL 6166975, at *1 (C.D. Cal. Sept. 5, 2023) (plaintiff alleging violation of California's right to publicity statute, Cal. Civ. Code § 3344, against defendant "for commercially exploiting his and thousands of other actors, musicians, athletes, celebrities, and other well-known individuals' names, voices, photographs, or likenesses to sell paid subscriptions to its smartphone application, *Reface*, without their permission").

[228] *See* Matthew Hutson, *Detection Stays One Step Ahead of Deepfakes—for Now*, IEEE Spectrum (Mar. 6, 2023), https://spectrum.ieee.org/deepfake (last visited Oct. 23, 2023).

Should increased labeling obligations for such deceptive content be warranted, MPA believes that labeling requirements should not apply to creative industries' use of AI for entertainment and expressive purposes. A clear distinction should be made between, on the one hand, the use of generative AI as a tool in the context of legitimate audio-visual works from the motion picture industry, whether fictional, reality, documentary, or otherwise; and, on the other hand, the use of generative AI outside of the creative sector to mislead and misinform.[229]

> *Question 28.2:* Are there technical or practical barriers to labeling or identification requirements?

It would be impractical for MPA members to label, with any detail, the varied uses of AI that go into a feature-length motion picture or television show and would also be disruptive to the viewing experience. There are numerous and varied inputs that contribute to the work, including through pre-production, costume and set design, special and visual effects, as well as post-production work, some of which may involve use of AI technology.[230] If labeling or identification is required, MPA members should retain a high level of flexibility in how to implement the requirements so that it will be unobtrusive to the viewing experience, for example, by inclusion in the end credits.

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[229] As explained in response to Question 32, "artistic style"—which is separate and apart from concrete expressions—falls outside what is protectible expression. *See* 2 Patry on Copyright § 4:14 (explaining an individual's style is not fixed and therefore not eligible for protection). MPA is aware that, to the extent someone is being wrongly impersonated, other laws (but likely not copyright) would apply. *See* Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 272 (2004) (explaining that "the Lanham Act [would not] allow me to purchase copies of the latest Brad Meltzer or John Grisham legal thrillers and resell them under my own name").

[230] *See supra* discussion in response to Question 18 (discussing how motion pictures are created with hundreds, or more, individuals contributing across thousands of creative elements).

G. Additional Questions About Issues Related to Copyright Law (Responding to Questions 30-32)

Question 30: What legal rights, if any, currently apply to AI-generated material that features the name or likeness, including vocal likeness, of a particular person?

Regulation of uses of an individual's name, image, likeness ("NIL"), and voice has traditionally been governed by the body of state law known as "right of publicity."[231] Approximately half the states have enacted right-of-publicity statutes, while almost all others recognize such a right through the common law.[232] Importantly, as properly interpreted, the right of publicity applies only to *commercial* uses of an individual's NIL, for example, when such NIL is used in an advertisement or on merchandise. But the right of publicity does not—and, to be consistent with the First Amendment, may not—regulate uses of or references to individuals' NIL in "expressive works," such as books, plays, news articles and broadcasts, songs, and movies and television programs.[233] Such expressive works are non-commercial speech fully protected by the First Amendment, regardless of whether those works are sold for a profit.[234] Thus, while AI no doubt raises many novel legal questions, existing state right-of-

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[231] Other bodies of law could potentially be implicated by AI-generated material that features the name or likeness, including vocal likeness, of a particular person include defamation or false light (e.g., if a digital replica falsely depicts an individual doing something he or she did not actually do or say, where the use injures the individual's reputation or is highly offensive to them), fraud, or trademark infringement. MPA's comments here, however, focus on right of publicity.

[232] *See generally* Jennifer Rothman, *Rothman's Roadmap to the Right of Publicity*, https://rightofpublicityroadmap.com (last visited Oct. 29, 2023).

[233] *See* Restatement (Third) of Unfair Competition, § 47(a) (right of publicity does not include "the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses").

[234] *See, e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (footnote omitted) ("It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not

publicity law is adequate to protect individuals against unauthorized uses of AI-generated replicas of themselves for commercial purposes.

A small number of states have recently begun to regulate the use of computer-generated likenesses of human beings to replace performances by professional actors and recording artists in expressive works in prescribed circumstances. In 2020, New York enacted a statute governing the use of a digital replica of a deceased performer "in a scripted audiovisual work as a fictional character or for the live performance of a musical work"; the statute applies, however, only "if the use is likely to deceive the public into thinking it was authorized by" specified heirs of the deceased performer.[235] In 2022, Louisiana enacted a similar statute that governs the "use [of] a digital replica in a public performance of a scripted audiovisual work, or in a live performance of a dramatic work, if the use is intended to create, and creates, the clear impression that the professional performer is actually performing in the role of a fictional character."[236] These statutes are technology neutral; they do not single out the use of AI to create digital replicas but would apply to replicas created by AI just as they would apply to replicas created by other technologies.

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prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.").

The Supreme Court has defined "commercial speech" as "speech which does no more than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (internal quotation marks omitted). "If speech is not 'purely commercial'—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection." *Mattel, Inc. v. MCA Records, Inc.*, 296 F. 3d 894, 906 (9th Cir. 2002).

[235] N.Y. Civ. Rts. § 50-f(2)(b) (effective Dec. 16, 2022).

[236] La. R.S. § 51:470.4(C) (effective Aug. 1, 2022).

The digital replica provision in Louisiana's statute applies only to **living** professional performers. La. Stat. Ann. § 51:470.3(B) ("the identity rights with respect to a performance in audiovisual works shall expire upon the death of the individual").

MPA's members are unaware of any cases brought under these new provisions, and whether these statutes would survive First Amendment challenge remains untested.

> *Question 31*: Should Congress establish a new federal right, similar to state law rights of publicity, that would apply to AI-generated material? If so, should it preempt state laws or set a ceiling or floor for state law protections? What should be the contours of such a right?

As noted in response to Question 30, existing state right-of-publicity laws govern uses of an individual's name, image, likeness, or voice for commercial purposes, such as in advertising or on merchandise. These laws apply whether the individual is depicted using traditional media such as a photograph or video recording, or a newer technology like AI.

MPA has been engaged in discussions for much of the past year with representatives of actors and record labels, as well as other stakeholders and congressional staff, to explore the creation of a new federal remedy that would address certain uses of digital replicas in expressive works, in a manner that respects established First Amendment protections. On Oct. 12, 2023, Senators Chris Coons, Marsha Blackburn, Amy Klobuchar, and Thom Tillis released a discussion draft of a bill titled the "Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act," which would establish a new federal intellectual property right governing the use of digital replicas.[237] MPA is working in good faith with staff and stakeholders on legislative text that adequately protects the fundamental First Amendment rights of filmmakers, documentarians, news organizations, and other creators.[238]

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[237] *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-voice-and-likeness-of-actors-singers-performers-and-individuals-from-ai-generated-replicas.

[238] For a detailed discussion of the First Amendment implications of legislation regulating the use of digital replicas in expressive works, *see Artificial Intelligence and Intellectual Property –*

> *Question 32:* Are there or should there be protections against an AI system generating outputs that imitate the artistic style of a human creator (such as an AI system producing visual works "in the style of" a specific artist)? Who should be eligible for such protection? What form should it take?

Copyright law bars the unauthorized copying of protectable elements of another's work.[239] However, the law does not grant individuals exclusive rights over artistic style. This is true whether imitations of style are affected via traditional technologies and artistic techniques, or through new technologies like artificial intelligence. This conclusion flows ineluctably from one of copyright's most fundamental precepts: that it protects expression, not ideas.[240] As the Patry treatise explains:

> One may not register a "style" with the Copyright Office. Instead, one registers a work, elements of which are original or not. Particular elements may colloquially be regarded as typical of an author or artist's individual style, but it is only their fixation in a particular work in a particular expression that is eligible for protection. It is only particularized, individual expression that is protected, and not style.[241]

Part II: Copyright: Hearing before S. Comm. on the Judiciary Subcomm. on Intellectual Property (2023) (statement of the Motion Picture Association, Inc.), https:hearing// www.motionpictures.org/wp-content/uploads/2023/07/MPA.SJC .statement.7.19.23.pdf.

[239] *See, e.g.*, *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116-17 (9th Cir. 2018) ("To state a claim for copyright infringement, Rentmeester must plausibly allege two things: (1) that he owns a valid copyright in his photograph of Jordan, and (2) that Nike copied protected aspects of the photo's expression.").

[240] *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."); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 57 (1976), at 57 (Section 102(b)'s "purpose is to restate … that the basic dichotomy between expression and idea remains unchanged.").

[241] 2 Patry on Copyright § 4:14.

Patry further notes that courts have consistently rejected arguments that copyright should protect style, involving artistic forms including the "anime" style of animation,[242] a particular style of writing,[243] and the Georgian style in architecture,[244] among many others.

Permitting copyright law, or any new right under another label, to protect style is not consistent with the idea/expression dichotomy. It also may harm artistic freedom, subjecting creators to litigation over imitation of "style," which itself may be vague and difficult to even define:

> 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.[245]

As the Supreme Court has observed, vagueness in speech regulation "raises special First Amendment concerns because of its obvious chilling effect on free speech."[246]

Under existing law, when the owner of one work alleges that another has infringed its copyright, courts must filter out the unprotectable ideas from the protectable expression. That is no easy task; for nearly a century, courts have struggled to apply the idea/expression distinction in the context of motion pictures.[247] Expanding the scope of plaintiffs' rights to include not only

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[242] *Williams v. 3DExport*, No. 19-12240, 2020 WL 532418, at *3 (E.D. Mich. Feb. 3, 2020).

[243] *Whitehead v. CBS/Viacom, Inc.*, 315 F. Supp. 2d 1, 11 (D.C. 2004) ("while similar writing styles may contribute to similarity between works' total concept and feel, a particular writing style or method of expression standing alone is not protected by the Copyright Act").

[244] *Charles W. Ross Builder, Inc. v. Olsen Fine Home Bldg., LLC*, 827 F. Supp. 2d 607 (E.D. Va. 2011), vacated *on other grounds*, 496 F. App'x 314 (4th Cir. 2012).

[245] 2 Patry on Copyright § 4:14.

[246] *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997).

[247] *See, e.g.*, *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 120 (2d Cir. 1930); *Funky Films*, 462 F.3d 1072.

their expression, but also their "style," would result in vastly more litigation and ultimately chill speech. The Recording Industry Association of America and National Music Publishers' Association identified precisely this problem in a brief seeking to overturn the verdict in the case alleging that the song *Blurred Lines* infringed on Marvin Gaye's *Got to Give it Up*: If the jury's verdict in favor of the Gaye estate were upheld, they argued, "[n]ew generations of musicians would be in constant peril of copyright lawsuits because they had used someone's musical style, even when they do not borrow the words, melody, harmony, or rhythm."[248]

Proponents of a new exclusive right to one's "artistic style" may claim that the issues identified above would only apply in the specific, narrow context of works generated with the use of AI tools. MPA would respectfully disagree with such a claim. As explained in response to Question 1, MPA's members employ tools that incorporate AI in the production and post-production processes; as this technology further develops, it is likely that the vast majority of motion picture and television programs will be touched by AI in some fashion. Such tools almost certainly implicate aspects of filmmaking that an enterprising plaintiff could characterize as involving "artistic style." For example, generative AI tools could be used to eliminate background noise and bring clarity to an actor's voice, or to propagate a particular lighting or other visual style throughout a work in routine post-production editing. Thus, it would be extremely difficult to keep plaintiffs from arguing that even a law addressed only to some narrow category of "AI-generated" works did not actually apply to virtually all works created by MPA's members and other producers of creative works.

[248] Br. *Amici Curiae* of Recording Indus. Ass'n of Am. et al. at 22, *Williams v. Gaye*, No. 15-56880 (9th Cir. Apr. 23, 2018), Dkt. 100-2.

If artistic style were protected, either through copyright or a new cause of action, that right potentially would have an extremely broad scope. This threatens to undermine the idea/expression dichotomy that has long delineated the proper scope of protection for creative works and facilitated the thriving motion picture and television industry that exists today.

* * *

MPA appreciates this opportunity to provide its views in response to the Notice of Inquiry. 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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