



American Society for Collective Rights Licensing

October 29, 2023

Submitted By Online Submission Procedure

Hon. Shira Perlmutter
Register of Copyrights
U.S. Copyright Office
101 Independence Ave., SE
Washington, DC 20559-6000

Response In Behalf of: The American Society for Collective Rights Licensing, Inc. ("ASCRL")
To Federal Register/Vol. 88, No. 167 [Docket No. 2023-6], Artificial Intelligence and
Copyright, Request for Comments.

I. Introduction

The American Society For Collective Rights Licensing, Inc. ("ASCRL") thanks the Register and Copyright Office for the opportunity to comment on the subject of artificial intelligence and copyright. This comment addresses the Copyright Office's solicitation of comments on the specific subjects of extended and voluntary collective licensing, individual licensing, and the urgent need for federal legislation to address these concerns. ASCRL strongly supports the creation of collective licensing systems for visual material authors to address the problems associated with the use of their work by generative artificial intelligence ("AI") platforms and their users.

II. Background

The American Society for Collective Rights Licensing, Inc., was established by and for authors as a not-for profit corporation in the District of Columbia in 2015. ASCRL's mission is to establish collective licenses and to administer, to collect, and to distribute collective rights revenue for U.S. based, and for foreign, collective licensing programs for U.S. illustrators and photographers, and for U.S. publications. ASCRL currently administers a highly successful collective licensing program that pays authors millions of dollars in collective licensing remuneration through triannual payment streams.





American Society for Collective Rights Licensing

Despite its relatively recent inception, ASCRL is now the largest photography and illustration organization in the United States. Its constituents include over 40,000 photographer and over 17,000 illustrator members. As an important preliminary matter, ASCRL notes that it is an ardent supporter of the “primary” copyright licensing markets of its authors and that ASCRL’s programs are solely intended to establish supplemental, or “secondary,” collective licensing systems in the United States and overseas. These include collective blanket licensing programs for internal business licenses (including ingestion for generative artificial intelligence machine learning), internal educational licenses, government use, and private social media use; all areas in which market failures, inefficiencies, and untenable costs, preclude licensing by rights owners and thwart the legal accessibility of copyright material for consumers. These programs currently operate under foreign licensing and levy programs that have been established around the world. It is ASCRL’s intention to extend these programs to the United States in accordance with a United States Department of Justice business review letter which is anticipated in 2023.

ASCRL is already recognized as being among the world’s leaders in the collective licensing field, occupying a unique place as the only not for profit collective licensing and distribution organization that operates for the benefit of photographers and illustrators in the United States. ASCRL is an Associate Reproduction Rights Organization with the International Federation of Reproduction Rights Organizations (IFRRO), a provisional member of the International Confederation of Societies of Authors and Composers (CISAC), a member of the International Author’s Forum (IAF), a member of United States Copyright Alliance, and an Observer Member of the association of European Visual Artists (EVA). ASCRL also maintains bilateral representation, licensing, and distribution agreements with collecting societies throughout the world, including Australia (Copyright Agency Australia), Austria (Bild-Recht), Belgium (SOFAM), Sweden (BUS), Denmark (VISDA), France (ADAGP), Germany (Bild-Kunst), Greece (OSDEL), and the Netherlands (Pictoright).

ASCRL has distributed millions of dollars in revenue from foreign collections. Distributions are processed using ASCRL’s proprietary state-of-the-art software and computerized database, which employs algorithms designed to compensate authors according to the size of their repertoire and the scope and penetration of their publications. The system is designed to administer and distribute both extended collective licensing funds and voluntary blanket licensing funds. It is also adaptable to implement advanced multi-level





American Society for Collective Rights Licensing

opt-in and opt-out procedures through “NIM” functions (name recognition, image specific recognition, and metadata detection) for members who may wish to include their repertoire in, or exclude it from, a collective licensing system.

ASCRL believes that its existing distribution processes are therefore prepared to administer an extended collective licensing, or voluntary collective licensing, program in the United States.

III. Comments

According to a report by the National Endowment for the Arts and the Bureau of Economic Analysis the arts and cultural sectors of the United States economy made up 4.4% of the nation’s GDP. Visual artists were part of a 40.1 billion dollar artist/writer/performer economy, and photographers added 9.9 billion dollars to the GDP (in 2021). On the local level this includes the professions of design, illustration, and photography that feed the corporate, advertising, media, editorial, publishing, business, and consumer marketplaces which employ hundreds of thousands of workers, consisting of small businesses throughout the nation that feed other sectors of the American economy. Clearly, the preservation of economic reward for the visual materials industries is good for the country, local economies, and surrounding businesses. It is therefore essential to the United States’ cultural standing that, as the AI marketplace becomes established, rewards that are offered to illustrators and photographers in the visual materials marketplace be enhanced and remain protected.

The Constitutional authorization to Congress to promote the arts by securing the rights of authors to their work was originally implemented based on the premise, now implemented by 17 USC Section 106, that authors could monetize their creations by controlling the right “to copy.” This is a paradigm that works poorly for individual authors in the context of the generative AI marketplace dealing with the ingestion of work for machine learning.

As a bottom-line analysis, the current protections of copyright law provide insufficient financial remedies, and are too procedurally complicated, to thwart unauthorized ingestion for machine learning for AI platforms through mass digitization. Statutory damages are not available for most of the visual repertoire in the United States because it





American Society for Collective Rights Licensing

is unregistered, and because it is not feasible to register the massive amounts of material that would be involved in any attempt to secure meaningful protection. Under most copyright cases, actual damages promise to be miniscule for isolated infringements akin to a small number of ingestions. Sizable litigation costs otherwise thwart enforcement and promise that future enforcement efforts by individual authors will cost more than they will yield. These concerns stand apart from the resolution of substantive legal issues that are involved in attempts at enforcement.

In light of the foregoing, the recent class action lawsuits that have been filed seeking to apply copyright law to generative AI machine learning ingestion, if successful, will not yield any meaningful results for individual authors in the visual space. Whatever is their outcome, the costs of rights enforcement will remain too high, the remuneration available through legal action will remain too low, the licensing remuneration to be received by authors in the context of ingestion for machine learning will be unrealized, and the motivation of authors to create their works will be undercut by a dysfunctional copyright system as applied to the AI machine learning ingestion market. In fact, the pending suits may prove to be detrimental to visual material authors to the extent that author claims for past ingestion will be resolved in class action fashion without meaningful remuneration to them, and they will be left on their own in future attempts to monetize their interests. Should they seek to do so, they can then look forward to substantive legal defenses to their claims concerning fair use and interim copying, and the inapplicability of copyright law to the protection of an author's "style," while the actual economic promise of prevailing in such arguments will be empty in practical terms even if they "win."

The comparative benefits of a collective licensing system are obvious. Collective licensing systems can make a nationwide visual repertoire available to generative AI platforms, and platform users, with great economy, efficiency, reasonable cost, and reasonable reward. This is beneficial to AI platforms and to the expansion of the generative AI industry. And it is also beneficial to the platform users and consumers who wish to use generative AI tools for their creative process. At the same time collective licenses can help mitigate the negative impacts on authors that result from the unfettered ingestion of visual material for generative artificial intelligence machine learning. While collective licensing systems will not completely immunize visual materials industries from job displacements, the assessment of fees for machine learning will reintroduce competition between platforms and human authors in the visual materials marketplace and assure that generative AI





American Society for Collective Rights Licensing

platform use will not be comparatively free or be able to undercut the use of human authorship for which there is a cost. In addition to the encouragement of greater market parity and competition, collective licensing systems provide remuneration to compensate authors for the use of their material for generative AI machine learning, consistent with constitutional objectives: to secure reward for creativity. Collective licensing systems can provide this remuneration through long term licensing streams, based on AI platform fees that can be absorbed by advertising revenues, platform subscriptions, and user payments.

Collective Licensing Societies play a key role in implementing collective licensing systems. They play an important role in making available to AI platforms and platform users machine learning from the works of individual authors, who are otherwise sidelined by more powerful content aggregators with large repertoires and who do not otherwise have a meaningful opportunity to participate in the machine learning and ingestion economy. They also play an indispensable role in the administration and distribution of the licensing remuneration and they can establish remuneration models that fairly take into account each author's publication history, the size of their repertoire, and the scope of its publication. They can also play an important role in administering each author's exclusion from (opt-out) or inclusion in (opt-in) the collective licensing system.

The Copyright Alliance (of which ASCRL is a member) has made a submission responding to this NOI, that acknowledges that certain industries believe that collective licensing is critically needed to address the ingestion of work for generative AI machine learning. The visual materials industries is one. This can be in the form of an extended collective license, which includes the larger visual materials repertoire, but from which authors can opt out if they do not wish to participate in the system. This can also be in the form of a collective license which includes only the visual materials of participants who join (opt in). Comparatively, the former system provides for a larger repertoire, and larger representation; the latter, a smaller repertoire, and a more difficult bargaining position for the collecting society and its members.

There are significant pro-consumer advantages to collective licensing for machine learning ingestion in the visual materials space. Collective licenses will facilitate content use, simplify legal authorizations, encourage platform development, benefit platform users, and compensate authors in a copyright space for visual material in which there is otherwise complete market failure for individual authors. The underpinnings for a





American Society for Collective Rights Licensing

collective licensing system should therefore include the enactment of an exemption to anti-trust laws to expressly allow for the establishment of collective licensing. And they should also include express support in the copyright law, or as a *sui generis* form of legislation, that mandates that visual materials cannot be ingested by generative AI platforms or their users for machine learning without a collective license, or authorization from the creator of the ingested work. Such licenses should be at fees negotiated between the platforms, users, and the collecting society and should not follow the compulsory models that include fees that are set by a government.

IV. Conclusion

The benefits of collective licensing systems are proven and are well established, and ASCRL is fortunate in being able to successfully administer existing collective licensing programs for individual U.S. authors and for U.S. publications. The benefits of such programs for platforms, consumers, and for authors in the visual space are obvious. None are well served by the existing paradigm of U.S. copyright law and its promise of failure to incentivize licensing and creativity. Either an extended collective licensing program with author opt-outs, or voluntary collective licensing programs, should therefore be implemented to address the above noted concerns about the use of the visual material created by individual authors by generative AI platforms and their users.

Sincerely,

s/James Lorin Silverberg/

James Lorin Silverberg
CEO
The American Society For Collective Rights Licensing, Inc.

