

Authors Alliance  
Library Copyright Alliance

December 6, 2023

Suzanne Wilson  
General Counsel and Associate Register of Copyrights  
United States Copyright Office  
101 Independence Ave. S.E.  
Washington, D.C.  
20559-6000

*Via Online Submission*

**RE: Reply Comments for Policy Study on Artificial Intelligence, Docket Number 2023-6**

Dear Associate Register Wilson:

Authors Alliance is a nonprofit membership-based organization with the mission of advancing the interests of authors who write for the public benefit by sharing their work broadly.<sup>1</sup>

The Library Copyright Alliance (“LCA”) consists of two major U.S. library associations: the American Library Association and the Association of Research Libraries. These associations represent over 100,000 libraries in the United States employing more than 300,000 librarians and other personnel. These two associations cooperate in LCA to address copyright issues that affect libraries and their users.

Our initial comments, available in the record at [COLC-2023-0006-8976](#) and [COLC-2023-0006-8452](#) make the case that copyright law is already adequate to address copyright concerns related to artificial intelligence. While we recognize that other aspects of the law (e.g., to address fraudulent uses) may merit further development, when it comes to copyright, judicial examination and learning have proven fruitful, which can then be used as the basis for later legislative revision—if needed. Based on our review of a substantial number of the initial comments, our conclusions and recommendations remain unchanged.

Our initial comments explain many of the beneficial uses of AI already being made in ways that serve copyright’s purpose of promoting the progress of science. We want to highlight to the

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<sup>1</sup> For more about Authors Alliance, our mission, and our leadership, see <https://www.authorsalliance.org/about/>.

Office the diversity of commenters with similar experiences: academic researchers using non-generative AI systems to measure and analyze works,<sup>2</sup> small publishers leveraging AI for efficiency gains as a way to level the playing field and better compete with the “big five”,<sup>3</sup> online platforms like Wikipedia using machine-learning to assist in automated translation,<sup>4</sup> libraries using AI to make digitized collections more discoverable by enhancing scan quality and automatically creating metadata,<sup>5</sup> researchers employing AI to improve text and data-mining based research techniques,<sup>6</sup> educators relying on AI to support students with disabilities,<sup>7</sup> and recording artists using AI to release a new single in six languages in one day.<sup>8</sup> While not all of the comments we cite agree with our conclusions about fair use, it is clear that all of these organizations and individuals have benefited from the development of AI systems and tools under an existing legal framework that has allowed models and systems to develop freely, with due recourse to the courts for evaluation of harms.

Regarding the question of whether the use of copyrighted works in training datasets for generative AI is a fair use, we would like to highlight and clarify a particular area of confusion for many commenters. Question 8 of the notice of inquiry asks whether and when the use of copyrighted works as part of training datasets to train generative AI systems constitutes fair use. That training is a separate use from the use of a generative AI system to generate an output that bears similarity to a copyrighted work. Unfortunately, several commenters collapse multiple uses—the use of copyrighted works as training data for generative AI models and the subsequent use of generative AI systems to generate outputs—into a single use.<sup>9</sup> This can be seen in initial commenter responses to question 8 that assume that the fourth fair use factor (market harm) should consider the effect of generative AI outputs on the market for a copyrighted work, and the fact that outputs might compete in the market with works in the training datasets means that factor four weighs against fair use. But those who create and train generative AI tools are not

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<sup>2</sup> Comments of David Bammon, COLC-2023-0006-8372, <https://www.regulations.gov/comment/COLC-2023-0006-8372>

<sup>3</sup> Comments of the Evangelical Christian Publishers Association, COLC-2023-0006-8674, <https://www.regulations.gov/comment/COLC-2023-0006-8674>

<sup>4</sup> Comments from Wikimedia Foundation, COLC-2023-0006-8758, <https://www.regulations.gov/comment/COLC-2023-0006-8758>

<sup>5</sup> Comments from Internet Archive, COLC-2023-0006-8836, <https://www.regulations.gov/comment/COLC-2023-0006-8836>

<sup>6</sup> Comments from the Program on Information Justice and Intellectual Property (PIJIP), American University Washington College of Law, COLC-2023-0006-9101 <https://www.regulations.gov/comment/COLC-2023-0006-9101>

<sup>7</sup> Comments from Chamber of Progress, COLC-2023-0006-8583 <https://www.regulations.gov/comment/COLC-2023-0006-8583>

<sup>8</sup> Comments from Universal Music Group, COLC-2023-0006-9014, <https://www.regulations.gov/comment/COLC-2023-0006-9014>

<sup>9</sup> See, e.g., Copyright All. comment, COLC-2023-0006-8935, <https://www.regulations.gov/comment/COLC-2023-0006-8935>; Authors Guild comment, COLC-2023-0006-90936, <https://www.regulations.gov/comment/COLC-2023-0006-9036>; American Ass’n Indep. Music & Recording Indus. Ass’n America comment, COLC-2023-0006-8833, <https://www.regulations.gov/comment/COLC-2023-0006-8833>.

themselves the ones creating outputs—not only are the uses separate, but the users are separate, and the creation of outputs is not automatic. Fair use is a fact-sensitive, context-specific inquiry, requiring precision when it comes to the particular uses, markets, and copyrighted works involved. The proper question in factor four is the effect of the inclusion of copyrighted works in training datasets on the market for the works in question.

The remainder of these reply comments are focused on comments submitted by the Federal Trade Commission (FTC),<sup>10</sup> which we worry could carry undue weight without additional context. We urge the Copyright Office to approach with skepticism those comments and the results and outcomes of the FTC’s “Creative Economy and Generative AI” Roundtable on October 4, 2023, a transcript of which the FTC included with its submission.

First, the FTC asserts that the roundtable it hosted “explored how the development and deployment of AI tools that generate text, images, and audio is impacting open and fair competition.” That roundtable did no such thing; invited participants offered almost nothing in the way of substantive commentary on markets or competition, but rather offered suggestions on ways to further enclose and protect their monopoly privileges. There were no representatives from firms—large or small—developing AI systems or models, nor did the roundtable have any meaningful discussion of the ways in which consumers, creators, and others are benefiting from these systems in their work. Moreover, the FTC’s event included (as far as we can tell), no participation from the US Copyright Office or the US Patent and Trademark Office, the agencies that are actually charged with and that understand the interaction between intellectual property and competition law. Unlike the Copyright Office’s more thorough and balanced listening sessions, the FTC’s roundtable offers a biased and incomplete view of the interaction between AI and creative industries. We therefore urge the Office to give little weight to the outcomes of that roundtable.

Second, the FTC apparently relied on this flawed roundtable to come to several conclusions that are unsupported by the law or facts – its comments suggest without real evidence that generative AI will harm creators whose works are used to train AI models, and that scraping and training should trigger liability. As the Copyright Office is well aware by conducting its own study, these conclusions are far from certain.

Finally, the FTC’s assertion about the scope of its authority under Section 5 of the FTC Act with respect to copyright is troubling, both in the context of AI uses and in many other situations involving copyrighted works. The FTC asserts that on the basis of copyright infringement, the FTC would have authority under Section 5 to initiate an enforcement action for an unfair practice or unfair method of competition. This would radically alter the regime Congress has established

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<sup>10</sup> FTC comments, COLC-2023-0006-8630, <https://www.regulations.gov/comment/COLC-2023-0006-8630>.

for private enforcement of copyright, giving the FTC authority as a public enforcer of private rights.

The FTC comments express an interest in protecting both consumers and creators. In our view, the biggest copyright risk to consumers, creators, and competition in the AI market is a regime in which AI training is dependent on licenses rather than fair use. A copyright rule that requires permission and licensing to train AI models would inevitably result in only the largest, most well-resourced corporations being equipped to develop new models. The costs of licensing at scale would be astronomical and out of reach for small firms.

Our main takeaway from reading the FTC comments is concern that it is poised to take premature enforcement action under the guise of “unfair competition.” Just as we are opposed to unwarranted legislative intervention, we believe aggressive agency action by the FTC could likewise undermine the role of the courts in resolving questions that are fundamentally rooted in copyright. We therefore recommend that the Office’s study consider whether and how overlapping agency interests can be best coordinated to prevent regulatory action that would stifle innovation and creativity in copyright-dependent sectors.

Respectfully submitted,



David Hansen  
Executive Director, Authors Alliance

On behalf Authors Alliance and the Library Copyright Alliance