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U.S. Copyright Office
Library of Congress
via regulations.gov

RE: Comments Submitted in Response to Notice of Inquiry (docket No. 2023–6)
        Artificial Intelligence & Copyright

Dear Copyright Office Officials:

Thank you for the opportunity to submit comments in response to the timely topic of artificial intelligence. I am submitting responses to selected questions that relate to visual art and particularly in regards to fine art and the impact upon artists.

My response is as an individual, but generally reflecting my capacity as a representative and advocate of visual artists. I am a New York lawyer and I have represented artists for about 15 years in matters that have encompassed licensing and rights management, including resolving incidents of copyright infringement, and as a representative or liaison in purchase and exhibition loan transactions. My comments reflect my experience with artists in the art industry, the concerns that artists and other creators have expressed to me on the subject of artificial intelligence and its use in generating works, and my legal perspectives on the subject.

Comments Responding to Questions 2, 8.1, 9, 10.3, 21, 32, 34

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?*

Contemporary visual artists perceive a significant risk that AI generated artworks will compete in the same or adjacent marketplaces as they do and that AI works will supplant the market for their original works. In a broader context, there are also concerns about a degradation of the human and cultural significance of fine art when AI generated works are included in the category without reservation. For individual artists, there is also a concern that AI is essentially an outsized competitor that has a particular advantage economically; that AI producers do not face the social burdens that artists do, such as having a low income along with the expense of art supplies and equipment. Some believe that the broad availability of AI-generated artworks will further degrade the social value of art in a culture that tends to disregard the importance of the work of artists already. A smaller number of artists believe that AI may eventually be a tool they could use for making original art. Thus, in the fine art sector, the largest issue is the impact of AI-generated

material on artists and their market, but in my view, this must also be balanced with the potential use of AI as an artistic tool itself.

The risk of injury posed to visual artists is perceived to be higher when AI-generated material is designed to mimic an artist's style or other expressive content. This is already happening. Visual artists are also concerned that their original works will be devalued because of (1) AI works may be priced lower than the amount that artists can afford to sell original work, and because (2) viewers may incorrectly perceive that original works are AI-generated due to similarities in content or style.

Many visual artists in this country have a low baseline income and creating original artwork is often labor and time intensive. Because of the likelihood of market competition with AI-generated works that likely have a much lower cost, there is a risk of discouraging the creation of human created visual art—especially, because many artists are economically burdened.[1]

Question 8.1: *In light of the Supreme court's recent decision in Google v. Oracle American and Andy Warhol Foundation v. Goldsmith, how should the "purpose and character" of the use of copyright works to train an AI model be evaluated? What is the relevant use to be analyzed?* [ ]...

The primary concern of visual artists is the unauthorized input of their original works to train AI models and to generate new works. The new works are effectively derived from, or are designed to imitate, the artist's original authorship. Artists are not compensated for unauthorized uses, while most popular AI image generating services are compensated by their customers. The purpose of these AI uses are ultimately financial and should be deemed a commercial use.

In the *Warhol v. Goldsmith* decision, the Supreme Court majority effectively found that licensing a derivative artwork that incorporates another party's original work, without authorization and for a fee, is a commercial activity that bends against a finding of fair-use. On this basis, a purpose and character analysis should bend against a finding of fair-use in most cases where an AI system utilizes an original work for training or for the process of generating a new work because the ultimate output is nearly always created for a consumer that provides some type of compensation to the AI system business.

In the facts of the *Warhol Foundation* case, Condé Nast initially obtained a license to use Lynn Goldsmith's original photograph as a source for a new work by Andy Warhol, but the publication of the "Orange Prince" work by Condé Nast many years later, according to the Court, exceeded the terms of that license. The Warhol Foundation also obtained a significant fee for licensing the derivative "Orange Prince" work to Condé Nast. However, the comparison to *Warhol* is limited in

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[1] "The median income for respondents was just $20,000 to $30,000, with 60 percent making less than $30,000" *How Hard Is It to Make It as an Artist? A New Study Shows There Are Many Paths to Success—and Failure* by Sarah Cascone, Arnet, June 12, 2018, available at https://news.artnet.com/art-world/artist-financial-stability-survey-1300895 (last visited October 30, 2023). *Also, How Much Money Do Visual or Contemporary Artists Make? Unveiling the Financial Realities of Artists*, Julien Delagrange, Contemporary Art Issue, Aug. 17, 2023, available at https://www.contemporaryartissue.com/how-much-money-do-visual-or-contemporary-artists-make (last visited Oct. 30, 2023).

cases where the AI company has used an original copyrighted work *without* any authorization from the author or copyright owner in the first instance. This is a primary concern of visual artists and other creators who have found (or anticipate) that their original works have been used without permission to create a new AI-generated work or for unauthorized training purposes.

AI systems are not capable of original, creative thought. That first use, in training or otherwise feeding an original work into an AI system, should be considered to be a primary infringement of the author's exclusive rights, including the right of reproduction. Depending on the form of the original work, other exclusive rights or distinct artist's rights may be implicated as well. When there was no license given by the author/owner of an original work, all subsequent uses of an artwork that is generated by AI from it should be viewed as infringements (i.e., a thief cannot pass along good title). These works would then be subject to a further fair-use analysis.

The purpose and character of the use of copyright protected visual artwork by an AI business is commercial because the ultimate reason of the use is to generate revenue or other benefits to the AI company. An AI business that provides services to consumers has an ultimate "reason[] for copying..." (*Warhol*, 598 U.S. ___, 43 (May 18, 2023)) that is economic whenever there is a benefit to the company, directly or indirectly.

The purpose of training an AI system that will be used by consumers is to generate new derivative works for the users. The new works incorporate the original (training or input) artworks in some element, or modify the original works, which is a service that is offered in exchange for money or other benefits to the AI business. The ultimate purpose of training a generative AI system that creates new works in this way is a commercial purpose because of the economic component, user payments, in most cases.

Most AI applications available to consumers are for-pay applications, have a for-pay feature, or require the transfer of some type of benefit to the AI service supplying company. The most popular AI image generation programs offer either a subscription based or a per use model of payment.

Midjourney has "four subscription tiers" where users can "[p]ay month-to-month" or a "for the entire year for a 20% discount." Available at http://docs.midjourney.com/docs/plans (last visited Oct. 27, 2023).

OpenAI offers **DALL-E2** usage at rates based upon generated image file resolutions, such as $0.02 currently for a 1024x1024 dpi resolution image. Available at https://openai.com/pricing (last visited Oct. 27, 2023).

Shutterstock has subscription plans tied to the use of its image collection, which includes its users' AI-generated works (https://www.shutterstock.com/pricing). Shutterstock further encourages their users to license their AI-generated images on a for-pay basis on the Shutterstock platform "...pay ongoing royalties to contributors for future revenue associated with AI-generated content which has been generated and licensed direct on the Shutterstock platform" (https://www.shutterstock.com/ai-image-generator, Oct. 27, 2023). This generates revenue for Shutterstock on both ends, and potential revenue to the image licensor for AI-generated works.

Other AI-generating plans that have a subscription pricing model include **Adobe Firefly** (https://www.adobe.com/sensei/generative-ai/firefly.html) and **Fotor** (https://www.fotor.com/pricing/). **Bing**, which uses DALL-E3 for AI-generation, currently appears to have a mixed model that uses "boosts" and "Microsoft Rewards" for credit (https://www.bing.com/images/create/hel?FORM-GENHLP). Microsoft rewards enables a user to "earn points" for "certain activities and...certain Microsoft products and services." (https://www.microsoft.com/en-us/servicesagreement/#14l_MicrosoftRewards, Oct. 27, 2023).

In each instance I observed, there is some form of payment, or at a minimum, a benefit or exchange of services, tied to the use of the AI generating program. In this way, the owners of the AI service benefit financially from the use of any copyright protected material that is used to generate new works, and the use is ultimately commercial in nature from their perspective.

Furthermore, AI image generation systems, to date, appear to have no actual ability to discern whether an end user is effectuating a non-profit educational purpose, and does not appear to actively confirm the copyright status of image files for those that allow user uploads, like Shutterstock. As demonstrated to me by my own client's experience, neither does an AI system prevent the use of key words that appear intended to source and infringe upon original copyright protected works. Notwithstanding, AI system business should assume that ultimate uses are commercial users as well. Rather, the purpose of training on original works is to supply end-users with material to generate new works, which are also likely to be offered for sale or otherwise used for commercial purposes.

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)?*

For visual artists, it is imperative that any use of artwork for AI training must by opt-in only. As in other instances, an opt-out scheme is inherently unreliable and has a high risk of failing to advise targets of their right to not participate. The use of an artwork without affirmative agreement by the author of the work, aside from infringing the work, may also run afoul of an artist's right of integrity and attribution. For example, the New York Artists Authorship Rights Act (enacted as New York Arts and Cultural Affairs Law § 14.03), protects qualifying artworks from reproduction, display or publication when they have been "altered, defaced, mutilated or modified [in] form" without the consent of the artist and "damage to the artist's reputation is reasonably likely to result or has resulted therefrom." The impermissible changes to an artwork include even seemingly simple alterations, such as cropping a copy of a visual artwork. *See Wojnarowicz v. American Family Ass'n*, 745 F.Supp. 130 (SDNY 1990).

Any involuntary use of original artwork, including copies used for AI training or input that may eventually result in the generation of a new work of visual art, would fundamentally be an altered artwork in this context. In many cases, the new AI work could be inferior in quality to the original or denigrate it in some way, and would reasonably risk injury the original artist's reputation and rights in New York.

Question 10.3: *Should Congress consider establishing a compulsory licensing regime?* [ ]...

For visual artworks, no, there should be no compulsory licensing regime established.

Compulsory licensing of visual artwork would seriously undermine the expressive rights of the originating artists, including their right to not speak and to not make derivative works or reproductions.

Compulsory licensing would likely also run afoul of visual artist's rights in some circumstances, particularly in New York. The New York Artists Authorship Rights Act protects qualifying artworks from reproduction, display and publication when the works have been "altered, defaced, mutilated or modified [in] form" without the consent of the artist and "damage to the artist's reputation is reasonably likely to result or has resulted therefrom."

The end result of a compulsory licensing scheme would constitute impermissible damage to the integrity of the original work by contravening the original artist's implicit right to not consent to changes to the original work, particularly if there is a possibility of injury to the artist's reputation. *See* New York Arts and Cultural Affairs Law § 14.03. *Also*, *Wojnarowicz* (745 F.Supp. 130, 135-136 (SDNY 1990)).

Question 21: *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?*

AI generated visual artwork material should be labeled or otherwise identified as such in many instances. Where the AI system has used copyright material for training or as input material, and generated a new work, the new work should be identified in some manner as AI-generated. An exception to this, based upon the view of artists who have an interest in using AI for their own art practice, is to not require a label when an artist only uses their own copyright material or public domain material to generate a new work.

A future challenge for human artists will likely be differentiating their work from AI-generated work. In the art marketplaces, the originality of a work has both aesthetic and monetary value. Human artists should be permitted to differentiate original works from those generated by AI in a manner that does not further burden them.

Since human generated original artworks are currently the default form, and because it would be impractical, burdensome and potentially demeaning if human artists are required to identify each and every artwork they created as "not AI," the burden of identification or labeling should fall on the creator of AI generated artworks and the AI system owner. Ideally, labeling should be a part of the production process. It is a minimal burden that could be embedded in the digital file and/or placed in text upon the AI generated image.

The public also has an interest in knowing the true source of artworks in the marketplace, whether they are made by a human author or by an AI process, and it would be prudent to require some type of identification of AI works. In the art marketplaces there is the potential for confusion, or even deception, as to the source of an artwork when an AI-generated work mimics or otherwise has a similarity to an original work. There is a risk of likely "confusion, or...mistake, or to deceive as to the affiliation, connection, or association...or as to the origin...." that could give rise to civil actions under the Lanham Act. 15 USC 1125 (a)(1)(A).

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?*

Yes, there should be protections. Visual artists have serious concerns about AI being used to imitate their works with varying degrees and forms of impact upon themselves and their livelihoods. The consequences of AI generated works that imitate the style, aesthetic, or expressive content of a specific artist can include: (1) supplanting the artist's work in the various marketplaces and venues for artwork (online markets, art fairs, galleries, museums), (2) the risk of AI-generated works being confused for original works, or (2) by an implication that the artist's original work is "easy" to create and inferior, thereby injuring the artist's reputation, and potentially impacting their position and reputation within the art world and in the history of art.

Where an AI system has trained on an artwork or a specific artist's body of work, which would likely be a necessity for identifying the "style," or when a specific artwork has been input to the system, and the AI system has subsequently generated a new work, this use should be deemed *de jure* infringement and the author of the original work should have a case at law for damages and equitable relief.

The scenario posed by the question is already occurring. I represent and have worked with visual artists and I have seen works online where the AI user has identified the key words for generating the new AI work and have identified an artist's name as one of those key words.

Copyright protected artwork is easily accessible for exploitation. Some art museums have online public databases of the works in their collections, including contemporary works that are copyright protected. Many artists have either a personal portfolio website or post images of their works on social media. These days an online presence is a necessary part of the art business for artists. The artist impacted in the incident I recently observed was my client. The key words that were used identified him by name and the AI generated work was inferior to the original works on several points. Yet, at this time the path forward for artists in this situation is unclear.

There are numerous injuries and conflicts that can result from permitting AI systems and individuals to generate works in the style of a specific artist:

Market conflict: The AI generated work "in the style of" a contemporary artist can directly compete with that artist in the same marketplaces, including online markets, art fairs, and galleries, and also in non-monetary settings that are important to an artist's career, such as museum

exhibitions. This is especially true for artists who work in a digital environment and produce works that are in a digital form for the purpose of sale or as an final output form. However, to the extent that physical prints or posters or other physical outputs are made from an AI-generated file, then the AI work also competes with physical artworks of the original artist, in the same markets, including online marketplaces and physical galleries.

Consumer protection: Somewhat like a trademark, an artist's style is an indicator of the source of the work. *Connoisseurship* is the ability to identify the maker of a work of art by style and technique. In the marketplace, an AI generated work that mimics a specific artist may violate the Lanham Act (15 USC § 1125), particularly when the key words used to create it include the artist's name, a title of the artist's original work, or another phrase associated with the artist.

While "style" may not be protectable in copyright, in the case of AI-generated works, a style or mimicked expressive content can potentially be used to mislead a consumer about the source of the authorship and originality of the work. It raises the risk of AI generated forgeries and when there is a doubt about the source, this also has a potential of lowering the value of the artist's original works because of the doubt created by the "style" imitators.

Artist rights: Perhaps most importantly to visual artists, AI material output "in the style of" a specific artist can implicate the original artist's rights of integrity and authorship. Because AI does not have the ability of original thought or creation, the output is the result of training on or inputting some form of the specific artist's original work. The AI-generated work is, in effect, a derivative work that is an alteration of the original work. When such a work is generated without the original artist's consent, this implicates artists' statutory rights in New York.

"[N]o person other than the artist or a person acting with the artist's consent shall knowingly display in a place accessible to the public or publish a work of fine art or limited edition multiple of not more than three hundred copies...or a **reproduction** thereof in an **altered, defaced, mutilated or modified form**" [so long as it would] "reasonably be regarded as being the work of the artist, and damage to the artist's reputation is likely to result therefrom..." New York Artists Authorship Rights Act (New York Art and Cultural Affairs Law § 14.03 (1), emphasis added).

It is fundamental that in training or inputting an original artwork into an AI system that the original work is reproduced (copied) in the process. Because the New York law extends to alterations of "reproductions" of the original work, permitting AI-generated works to train on works or input originals to create new works in the style of a specific artist, the right of integrity in the original work would be damaged. *See Wojnarowicz v. American Family Ass'n*, 745 F.Supp. 130 (SDNY 1990). *Also*, *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 24-25 (2d Cir. 1976) (unauthorized editing to a program constituted an actionable mutilation). There is a "right of the artist to have his work attributed to him in the form in which he created it." *Id*. at 24 (emphasis added) citing 1 M. Nimmer, Copyright § 110.1.

When key words are input to generate a work based upon a specific artist, including the artist's name, this is also a form of attribution of the artwork that in my view also implicates artists rights in New York for qualifying works: "Except as limited...the artist shall retain at all times the right to claim authorship, or, for just and valid reason, to disclaim authorship of such work...." (New York Art and Cultural Affairs Law § 14.03 (2)(a)).

For many artists, instituting a lawsuit in any circumstances is a high burden. For this reason I would urge that there be protections to prevent AI from creating works in the style of a specific artist and that the process for seeking remedies has the lowest possible burden for the injured party. Liability should extend to the owner of AI systems that do not prevent the conduct and to the individual or organization who causes an imitative work to be generated.

Question 34: *Please identify any issues not mentioned above that the Copyright Office should consider in conducting this study.*

Regarding copyright registrations of works containing AI-generated material, I respectfully suggest that the Copyright Office consider requiring registration applications to clearly and specifically identify AI content when the work contains any AI-generated material. This information will facilitate the identification of AI generated content, more clearly establish what portion of the work is original, and could be an aid in any infringement cases that arise in connection with a work that contains AI-generated material.

In my view, it would be also be prudent to require a description of the source for the AI material, including any original artworks, the author of the original artworks that were used, including those that are currently copyright protected, the title of each original artwork used, all key words that were used to generate the work, and the name of the AI system that generated the work. *Also see* my response to question 32 for additional points related to this subject.

Thank you again for this opportunity to respond to an issue which is of critical importance to visual artists and other original creators.

Respectfully Submitted,

/s/ *Jennifer L. Unruh*

Jennifer L. Unruh