Before the
United States Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000

Artificial Intelligence and Copyright Request for Information	Docket No. 2023-6

REPLY COMMENTS OF PUBLIC KNOWLEDGE

We thank the Copyright Office for the opportunity to comment on the questions presented, and reply to other submissions.

First, we must remember that, although most commenters (present company included) have offered their opinions on whether or not including copyrighted works in generative artificial intelligence (GAI) training sets is a fair use under the four-factor test, that is a question that can only be resolved definitively by litigation—and will likely vary depending on the models at issue.[1]

Second, we agree that the precarity and power imbalances of creative labor markets are, as we noted in our initial comments, a serious concern worthy of deeper investigation and forceful policy action. However, these imbalances cannot be meaningfully addressed via "tweaks" to copyright law as it relates to GAI. Questions of credit, compensation, and the balance of control between rightsholder employers and creative employees are issues of labor law, not copyright.[2] The recent strikes by the Writer's Guild and SAG-AFTRA, which were followed by membership ratification of groundbreaking new contracts that protect the interests of creative workers from the unfair use of AI without upending long-standing

[1] For a helpfully thorough examination of fair use as it applies to a number of foundational model types, *see* Henderson et al, *Foundation Models and Fair Use* (Mar. 29, 2023), https://arxiv.org/abs/2303.15715.

[2] While outside the scope of this proceeding, it bears mentioning that the majority of labor and job displacement issues that may arise from AI are unrelated to any copyright or copyright-adjacent issue.

principles of copyright law, demonstrate this.[3] These questions will not be resolved by introducing a wholly novel clearance regime requiring users to identify, locate, and individually negotiate with a vast (and potentially unknowable) field of non-rightsholder contributing creators. The central premise of copyright law is that the rightsholder exercises bounded control over subsequent use of a work—and thus can negotiate for appropriate compensation. There are numerous equity problems concerning who receives the right in the first instance; these, however, are vast, industry-wide wounds that cannot be bandaged by tweaking copyright law within this narrow context.

A "creator clearance" ancillary right is also practically unworkable. Identifying an active copyright holder is difficult enough; investigating an unknown (and potentially unknowable) field of contributing creators, each wielding unilateral veto power, would create an impassable logjam for those entities which *do* want to license data. Nor does the law allow for it. This is not the first time this Office has been urged, on the basis of equity, to endorse a framework of such ancillary rights. The Office correctly rejected such a call the last time it was made, noting that any new rights strong enough to "meaningfully improve" the balance of power "would necessarily avoid or narrow limitations on copyright that have critical policy and Constitutional dimensions."[4] The Supreme Court has held that fair use is necessary for copyright law to coexist alongside the First Amendment;[5] any new ancillary right that limits or overrides fair use in the name of equity would run afoul of that balance.

Finally, we feel that it is important to emphasize that copyright law and competition law coexist and compliment one another. It is certainly true that the market power conferred by copyright can be used to unduly exercise market power in a number of ways,

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[3] *WGA Ratifies 2023 Tentative Agreement With AMPTP* (Oct. 9, 2023), https://www.wga.org/news/press/wga-ratifies-2023-tentative-agreement-with-amptp; *SAG-AFTRA Members Approve 2023 TV/Theatrical Contracts Tentative Agreement* (Dec. 5, 2023), https://www.sagaftra.org/sag-aftra-members-Approve-2023-tvtheatrical-contracts-tentative-agreement.

[4] U.S. Copyright Off., *Copyright Protections for Press Publishers* (June 2022), https://www.copyright.gov/policy/publishersprotections/202206-Publishers-Protections-Study.pdf.

[5] Eldred v. Ashcroft, 537 U.S. 186, 219-220 (2003).

including by choking out competitors' pathway to market,[6] imposing unfair licensing practices, and controlling downstream repair monopolies.[7] As the D.C. Circuit noted while rejecting an argument by Microsoft in an antitrust case,

> Microsoft's primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes: "[I]f intellectual property rights have been lawfully acquired," it says, then "their subsequent exercise cannot give rise to antitrust liability." … That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability. As the Federal Circuit succinctly stated: "Intellectual property rights do not confer a privilege to violate the antitrust laws."[8]

It is self-evident that a user who makes a fair use of copyrighted material might then go on to violate the law in other ways, including by exhibiting anticompetitive behavior. However, competition law cannot transform a non-infringing, lawful fair use (in this case, the use of copyrighted works in training data sets) into an unlawful, infringing one. Whether the "reproduction" or "public performance" of a copyrighted work may impinge upon a rightsholder's exclusive rights is a straightforward question of federal copyright law[9]— and making a fair use *by definition* does not violate any of these rights.[10]

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[6] *See* Meredith Rose, *Streaming in the Dark: Competitive Dysfunction within the Music Streaming Ecosystem*, 12 Berkeley J. Ent. & Sports L. __ at 30-32 (forthcoming, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4586800.

[7] U.S. Copyright Off., *Section 1201 of Title 17* at 92 (2017), https://www.copyright.gov/policy/1201/section-1201-full-report.pdf.

[8] US v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001), *citing* In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1325 (Fed. Cir. 2000).

[9] Notably, the Second Circuit recently upheld a decision that an unfair competition claim based upon the unauthorized reproduction and distribution of a copyrighted work is preempted by federal copyright law. *See, e.g.,* MLGenius Holdings LLC v. Google LLC, No. 20-3113, 2022 U.S. App. LEXIS 6206, at *2 (2d Cir. Mar. 10, 2022) (cert denied). *See also* Jackson v. Roberts (In re Jackson), 972 F.3d 25, 43 (2d Cir. 2020); Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. Kg., 510 F.3d 77, 86 (1st Cir. 2007).

[10] *See* 17 U.S.C. § 107 (fair use "is not an infringement" — not an "excused infringement" or an affirmative defense).

Moreover, 17 USC 107 already considers important competition principles as part of its four factor analysis. The fourth factor, which is often *de facto* determinative,[11] examines "the effect of the use upon the potential market for or value of the copyrighted work."[12] Fair use is rarely found where the value of the copyrighted work is irrevocably and significantly damaged.[13]Finally, as mentioned above, fair use is a constitutional necessity.[14] It cannot be treated as a second-class right that can be abrogated for some other reason. We thus advise that the Office resist arguments to the contrary.

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[11] Michael G. Anderson et al., *Market Substitution and Copyrights: Predicting Fair Use Case Law*, 10 U. Miami Ent. & Sports L. Rev. 33 (1993)

[12] 17 U.S.C. § 107.

[13] Whether the training "use" damages a potential market—and what the relevant market (licensed training data, or artistic output) *is,* for purposes of a fair use analysis—are questions being actively litigated.

[14] 537 U.S. 186, 219-220.