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Notice of Inquiry: Artificial Intelligence and Copyright

COMMENTS OF THE ASSOCIATION OF MEDICAL ILLUSTRATORS (AMI)

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The Association of Medical Illustrators (AMI) is the sole professional organization for biomedical illustrators, animators, and interactive designers. The works of our members serve a critical role in the advancement of science and medicine in the U.S. and throughout the world. All medical illustrators rely on the protections of copyright and on the divisibility of exclusive rights, granted through licensing, to earn their living.

The medical illustration and animation profession engages in a vibrant primary licensing market serving science and medicine. Artificial intelligence is not new to us. We collaborate with clients in universities, pharma, and biotech to visualize their AI-powered drug discovery methods, automated AI diagnostic image detection, and machine-learning genomic research.

We are users of AI-assisted tools in creative software (Adobe, Blender, C4D, Microsoft, etc.) for ideation and automation of tasks that enable efficiencies in our craft — telling science stories with impeccable accuracy and illuminating artistry. Yes, our works are expressive, but more importantly they teach.

While medical illustrators hone their craft over years of practice and masters-level education, companies like Stability AI, Midjourney, and Dall-E are using our works without consent, credit, or compensation while raising billions from venture capital. Public AI image generators flood the market with acceptable, albeit inaccurate, imagery that can displace the demand for highly trained artists that create reliable science communication.

AMI appreciates the opportunity to provide comments on generative AI and its impact on our members' copyrights and markets. We have chosen specific questions to answer.

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?

We support ethical generative AI models with training sets built on **consent, credit, and compensation**. We demand accountability for the illegal copying of our works by AI bot crawlers that scrape our online portfolios, stock catalogs, and social media channels in a ravenous "ingestion" of our copyright-managed images and animations. Copies of our high-quality, accurate visual works now serve as "fuel" to a machine derivative generator. Human artists have lost their exclusive rights to control the use, reproduction, performance, and derivatives of their creative works.

We are very concerned about potential new AI rights or exceptions that may negatively affect our markets. Legislation designed to address public generative AI tools and apps may have unintended consequences or create loopholes for enterprise generative AI. Medical publishers and content aggregators hold vast catalogs of collective works containing writers' text and artists' images licensed under narrow contract terms for reproduction, distribution, and display. Illustrators are already adding No Generative AI Training or Data Mining clauses into their contracts in anticipation of publishers sublicensing our works for training without express permission. If concepts like noise and diffusion are deemed non-infringing, then nothing prohibits companies from building enterprise generative AI models from their holdings that would compete with our human-authored works.

Our works are embedded in educational and scientific publications, making it accessible via fair use and TDM exceptions in foreign countries to train AI models. While publishers grant TDM rights to collective works (journal articles, books) for text mining, our third-party owned images are swept into the rights granted despite publishers not having the authority to do so.

Access to copyrighted works for academic research to develop AI/ML methods or processes may be done under fair use guidelines. However, commercialization of that academic model must start over with properly sourced training images. It is not fair use to continue to market and profit without compensation to the millions of artists comprising the training set. **The LAION-B dataset (and others) should be disgorged of in-copyright images and rebuilt using consented and/or licensed works.**

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)?

Opt-In is the only way forward as it honors the first pillar of ethical AI — Consent. Opt-outs are inefficient and put the onus on the individual artist to manage rather than the well-funded tech company who should conduct their business legally and responsibly — respecting intellectual property as well as privacy rights. The public is largely unaware that their personal family photos are in image training datasets.

9.1: Should consent of the copyright owner be required for all uses of copyrighted works to train AI models or only commercial uses?

Consent or a license should be obtained for all uses per existing copyright law. Non-commercial use is a viable market for medical illustrators. Fair use is a defense to infringement not a license. No blanket legal certainty of fair use should be granted to AI developers, as fair use is a fact-

specific analysis of four factors and each genre of expressive work experiences different market harms.

9.2: If an "opt out" approach were adopted, how would that process work for a copyright owner who objected to the use of their works for training? Are there technical tools that might facilitate this process, such as a technical flag or metadata indicating that an automated service should not collect and store a work for AI training uses?

The default approach **should never be opt-out** as it puts the burden on the creator, who by law retains copyright by *default* the moment their expression is fixed in any tangible medium, now known, or later developed. By supporting an "opt-out" process the government would no longer protect an individual's right to their own intellectual property, but instead grant a "taking" of private property to AI tech companies.

In practicality, the opt-out approach is a red herring because metadata is easily removed, and artists will never have access to header code or .htaccess files on websites where their copyrighted works appear. The biggest reason opt-outs will never work for copyright owners is that online piracy, shadow libraries, and dark web image banks are rampant — providing an endless supply for AI bot crawlers. The DMCA whack-a-mole cycle that artists currently struggle with would be further exacerbated by AI opt-outs. There is no workable AI opt-out that requires artists to spend their time searching multiple image training sets or use third party tools like Spawning or Kudurru to stop illegal activity.

Again, **consent** is the only approach aligned with current copyright law. Artists have the right to determine if AI tools can crawl and copy (ingest) their copyrighted works. AI developers should honor crawler tags, meta tags, and embedded visible signals of opt-in or opt-out, if they are present. These are voluntary measures.

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?

All existing copyright infringement and §1202(b) claims and remedies are afforded creators for illicit use of their works in AI training datasets. There should be no safe harbor provisions or separate causes of action.

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?

This is a thorny question of moral rights to attribution and integrity, which the US has failed to implement and harmonize with other nations and the Berne Convention. In the face of AI, moral rights are critical to addressing synthetic likeness and "in the style of" prompts that impersonate creators, living or dead, especially as it relates to their livelihoods or reputational harm. Please see our comments to question 32 below.

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

The current model of direct voluntary licensing serves independent artists and large companies alike with the legal certainty necessary for ethical AI training datasets and image generators.

Let us not repeat the e-rights grab precipitated by publishers and aggregators of collective works at the dawn of the internet—and litigated in the long battle of *Tasini v. New York Times* from 1993-2001. The Supreme Court affirmed the freelance authors right to payment for use of their works in *new products* — databases — and this easily applies to AI training datasets.

As Mary Beth Peters, Register of Copyrights, wrote in a letter to Congressman James P. McGovern when he requested her views on *New York Times v. Tasini*, "Although, in the words of Barbara Ringer, former Register and a chief architect of the 1976 Act, the Act represented 'a break with the two-hundred-year-old tradition that has identified copyright more closely with the publisher than with the author' and focused more on safeguarding the rights of authors, **freelance authors have experienced significant economic loss since its enactment. This is due not only to their unequal bargaining power, but also to the digital revolution that has given publishers opportunities to exploit authors' works in ways barely foreseen in 1976**." [emphasis added] [1]

Also noting the decline of author rights since the 1976 Act contrary to Congressional intent, in her *New York Times v. Tasini* opinion, Supreme Court Justice Ruth Bader Ginsburg dismissed the publishers' warning that a ruling adverse to them would have "devastating" consequences for the historical record. "The parties," she wrote, "may enter into an agreement allowing continued electronic reproduction of the Authors' works; they, and **if necessary, the courts and Congress, may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution."** She further stated there was **"no basis for this Court to shrink authorial rights created by Congress."** [emphasis added] [2].

It has already been more than two decades since the courts recognized the damage to authorial secondary rights. Secondary royalty income has, in fact, been lost to visual authors for more than 30 years. Yet, it is a royalty stream that continues to expand in both value and market share. With the rapid onset of generative AI, the digital royalty income stream for creators shifts tectonically again.

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

Yes. Direct voluntary licensing of visual art and animation has existed for centuries and is the economic engine of the creative industries. AI is a potential new licensable use and may be a boon to those with high-fidelity, highly accurate catalogs should they wish to engage in this new market. Many medical illustrators and animators license their existing stock images, and some may wish to license their large catalogs for AI image training. This is already happening with companies like Shutterstock and Adobe Stock. Any involuntary collective licensing scheme will undermine normal licensing business where control and exclusivity are honored.

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[1] Mary Beth Peters, Register of Copyrights, U.S. Library of Congress, Letter to Congressman James P. McGovern re *NYT v. Tasini*, Congressional Record, February 14, 2001, at pages E182-3.

[2] Ruth Bader Ginsburg, *New York Times Co. v. Tasini* (00-201) 533 U.S. 483 (2001) 206 F.3d 161, affirmed Pp. 19021, http://www.law.cornell.edu/supct/html/00-201.ZS.html

10.2: Is a voluntary collective licensing scheme a feasible or desirable approach? 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?

Voluntary collective licensing can only work if there are trustworthy CMOs. AMI has commented previously in the 2015 NOI on Visual Works about the broken domestic voluntary collective licensing situation in the U.S. for visual artists. For over 20 years, the AMI and a coalition of other illustrator groups (ASIP-repro.org) have attempted to create a functioning CMO of their own to secure remuneration for both domestic and foreign secondary reprography.

AMI is a strategic partner with the Artists Rights Society (ARS). ARS is the preeminent copyright, licensing, and monitoring organization for visual artists in the United States. Founded in 1987, ARS represents the intellectual property rights interests of over 122,000 fine artists and their estates from around the world. In 2013 ARS opened its membership to illustrators for official representation of their collective rights from secondary royalties destined for illustrators from *foreign* reprographic royalty organizations (RROs). Illustrators join ARS by signing an *individual* legal mandate allowing ARS to act on their behalf to repatriate royalties with 42 sister visual art collecting societies abroad governed by CISAC. Every ARS member is assimilated into the IPI (Interested Party Information) system—a globally unique identification of a natural person or legal entity with an interest in an artistic work. The IPI system eliminates potential confusion among the same or similar names in a global database and ensures that each artist is only represented by one society for collective rights management. It is used by more than 120 countries and three million rightsholders. **In short, American illustrators with an IPI number are findable, authenticated, and payable.** ARS does not represent agents of artists, stock companies, or trade organizations—a practice that inflates the number of represented artists and opens the CMO to collect monies "for the benefit of the class", without renumeration to individual artists.

We have asked Congress and the Copyright Office to regulate CMO's in the US to ensure transparency and equitable distribution of collective licensing monies to all rightsholders.

The Copyright Clearance Center (CCC) was created *by* and *for* publishers who own rights to published collective works. They share reprographic monies with some text authors, but not the visual authors. Publishers' failure to share secondary licensing revenue has an exaggerated impact on medical and scientific illustrators since their works are far more likely to be reproduced in institutions comprising the primary market for STM publications.

We are aware the CCC is positioning themselves to be the clearinghouse for collective licensing for AI and want to be clear they do not possess all the rights to third-party owned visual content embedded in articles and books.

> Generative AI is set to add up to $4.4 trillion of value to the global economy annually, according to a report from McKinsey Global Institute published in June. "CCC is collaborating with stakeholders, including rightsholders and users, to develop market-

based licensing solutions while we advocate for responsible policies that respect copyright," said Armstrong.[3]

We are also aware of a new organization, the American Society for Collective Rights Licensing (ASCRL), founded by *photographers and graphic artists*, positioning themselves as a CMO for collective licensing for AI. It bears reminding the Office that there is historically a misappropriation of visual art royalties by the Authors' Coalition of America (ACA) and its member organizations. Instead of returning monies to the individual creators who earned it, they keep the monies for the "benefit of the class" to fund their trade organization education and advocacy efforts. AMI believes this scheme is fundamentally wrong and the royalties should be paid to individual creators who earned them.

We reject any voluntary collective licensing organization that lacks the mandates, authorization or even recognition of the need to compensate the visual authors whose works comprise the databases, nor recognize visual art CMOs as the rightful intermediaries to receive the royalties due for distribution to visual artists.

Effective voluntary collective licensing is about trust. The U.S. should have genre-specific CMOs that negotiate in the best interest of their members following European models like DACS (UK) and ADAGP (France). Each of these visual disciplines demands a unique set of skills, artistic sensibilities, and time investments. By aggregating these diverse visual artists under a single AI training fee, it risks undermining the value and specialization that each of these professions brings to the artistic and creative landscape. It is essential to recognize and respect the unique talents and efforts of fine artists, commercial illustrators, and photographers by not treating them as a homogenous group when it comes to AI training fees.

10.3: Should Congress consider establishing a compulsory licensing regime?

No. Compulsory licensing has worked poorly for musicians and especially songwriters. Due to a lack of transparency, songwriters do not know if compulsory licensees are reporting and paying accurately, among other concerns.

10.4: Is an extended collective licensing scheme a feasible or desirable approach?

No, not for commercial illustration and animation. AMI has commented previously in the 2015 NOI on Mass Digitization ECL Pilot Program[4] and in the 2015 NOI on Visual Works[5], **there is no functional CMO for secondary licensing of <u>domestic</u> commercial art and illustration in the US**. But the Artists Rights Society **<u>could</u>** perform this function, as it does for its sister visual societies abroad; if only the domestic CMO Copyright Clearance Center would honor the licensing agreements of published visual artists and cooperate with visual art CMOs as the rightful

[3] https://www.copyright.com/media-press-releases/ccc-to-host-virtual-town-hall-on-ai-licensing-and-the-path-forward/. Accessed October 29, 2023.

[4] Association of Medical Illustrators comment to U.S. Copyright Office NOI Mass Digitization Pilot Program, October 9, 2015

[5] Association of Medical Illustrators comment to U.S. Copyright Office NOI Copyright Protection for Certain Visual Works, July 23, 2015.

intermediaries to receive the share of income generated proportionate to our published content in the collective work.

> *"AMI believes that establishment of an extended collective license (ECL) pilot program for mass digitization is premature until existing mechanisms for collective licensing are reformed. At the present time visual artists in the United States are unable – through no fault of their own – to receive any benefit or remuneration from collective licensing of works containing their copyrighted images. There are two methods of collective licensing of literary works currently in use in the United States: Annual (non-title specific) licenses for reprographic use of works issued by the Copyright Clearance Center (CCC) and site licenses that provide digital access to aggregated content and are marketed either directly by publishers or with their permission and cooperation. While these existing licenses are marketed to users as including all content, publishers actively resist any request by illustrators to receive a share of the income generated."* [6]

Millions of dollars of royalties generated by the re-publication of our works, both in the US and abroad, have been averted from visual artist rightsholders. This has contributed to a substantial economic loss to American fine artists, illustrators, photographers. The continued disarray has prevented published visual artists from the full enjoyment and exercise of their copyrights and is fully inconsistent with the intent of authorial rights granted by US Copyright law.

The US needs **regulatory oversight and transparency by the government** of CMOs — not antitrust exemptions. Resale Royalty legislation advanced by Congressman Jerrold Nadler included CMO qualifying criteria as a provision, yet it has failed to pass in over 5 Congressional terms, leaving the US last in the developed world to implement its treaty obligation with the Berne Convention. By adopting qualifying criteria, consistent with the world's network of authors' societies under CISAC (International Confederation of Societies of Authors and Composers), and to which the Artists Rights Society adheres and is a member, the US could finally move into ethical and moral compliance to remunerate its visual artists with secondary royalties.

The United States ranks within the top 10 countries collecting *visual art* royalties—collecting 7.8 million EUR in 2022[7], even without enacting the resale royalty that now accounts for the "second largest visual art income source" after reprography in other countries. With the coming lush flow of money from generative AI licensing, CISAC reports "The global collective management community is experiencing an extraordinary wave of change." "While…collections have reached record levels, we cannot ignore the growing inequalities and imbalances between different regions, income streams, and large and small societies[8]."

We again ask the Copyright Office not to advance any ECL framework until issues with voluntary collective licensing CMOs are made fair and accessible for all rightsholders. This includes recommending Congress pass legislation defining qualifying criteria consistent with

[6] Association of Medical Illustrators comment to U.S. Copyright Office NOI Mass Digitization Pilot Program, October 9, 2015

[7] CISAC Global Collections Report 2023 for 2022 Data, at page 21. https://gcr2023.cisac.org/EN/

[8] Marcelo Castello Branco, CISAC Board Chair Forward, CISAC Global Collections Report 2023 for 2022 Data, at page 4. https://gcr2023.cisac.org/EN/

US Copyright Law and our international treaty obligations and conventions, upholding the genre-specific authorial rights of American visual artists.

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

Yes, licensing regimes should vary based on the type of work at issue. Different types of creative works often have distinct characteristics, intellectual property considerations, and industry norms. Tailoring licensing regimes to the specific needs and nature of the work helps to ensure fair compensation for creators and promotes innovation and creativity within various artistic fields. Therefore, a one-size-fits-all approach to licensing may not adequately address the nuances and requirements of different types of creative endeavors.

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?

Yes. All parties should be required to collect, maintain, and disclose records for not only transparency, but also during the discovery phase of any infringement litigation, and to comply with data deletion requests to remove an artist's work from a training dataset. It is worth noting the reluctance of the tech sector in adhering to DMCA regulations, making it crucial for both parties to maintain records to facilitate transparency. Provisions of this nature should therefore not only require record-keeping, but also include meaningful penalties for noncompliance.

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?

It's important to note the distinction between use of an AI-assisted tool in Photoshop, versus creation of an entirely new image based on selections (text prompts) that pull from a database of images. The line between the artist controlling the tool or a machine controlling the output, is a determining factor.

When AI is used as an "ordinary tool" to enhance or quickly modify an artistic expression, it should bear no weight against the ability to copyright the final output.

"New works" created entirely by a machine (i.e., fully generative-AI works) should not be copyrightable when the artist is not in control of the expression that is output. For example, works generated by text prompt should not be copyrightable. Fully-generative-AI works are an uncontrolled outcome that reflect the underlying works in a machine (AI model)'s database and are, by definition, derivatives of the original works. These outputs are uncopyrightable because the machine is the author.

In instances where "new works" can be generated by enterprise-AI under the original-author's explicit consent to the derivative work, along with credit and compensation, *and* control of the expressive work in the database; the resulting work should be copyrightable… because the original author has been in control of the *expression* of the derivative work. As medical

illustrators with large catalogs of our own works, we are in a unique position to *train* an AI model with a database of our *own* copyrighted works. When an illustrator is able to populate a database solely with their own copyrighted works, and further "directs the tool's accomplishment of its task and entirely forms the conception that will determine the expressive content of the result.[9]"— "then the user has both conceived of and executed the resulting work, and is therefore the sole author of the resulting work just like the user of an "ordinary tool.[10]" In this circumstance the AI model functions as an "ordinary tool" for the illustrator to access and create new works, and the illustrator should be allowed to register their copyrights as the author.

As the Copyright Office has recently confirmed, ultimately copyrightability relies on identifying the human author's expressive content of a particular work, under individual examination.

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?

Artists are rightfully protesting prompts "in the style of" and striking over the new harms that synthetic media are having on their livelihoods, likeness, and reputations — especially now that AI has rendered the exclusive derivative right moot.

The Copyright Office should re-examine their position on moral rights in which they stated, "the Copyright Office concludes that many diverse aspects of the current moral rights patchwork—including copyright law's derivative work right, state moral rights statutes, and contract law—are generally working well and should not be changed." [11] The 2019 study report went on to recommend legislative improvements to the Lanham Act, VARA, Section 1202 removal of copyright management information, and adoption of a right of publicity. None of which has occurred.

In the face of AI, the moral rights patchwork is clearly not working. **Now is the time for the Copyright Office to recommend Congress implement a federal moral right and a publicity right for visual artists and their signature styles that is in harmony with international treaties.**

Notable scholar Jane Ginsburg has written extensively[12] supporting the need for a legislative statute on moral rights as she foresaw the harms of AI to human authorship and the rights conferred with originality and integrity.

Prolific and well-known illustrators that dominate in a niche market are particularly vulnerable to "in the likeness of" and "in the style of" generated works. There is no mistaking the use of "in the style of" generated works deny an artist's commission and licensing opportunity. Furthermore, medical illustrators are held to a professional standard of accuracy *and*

[9] Jane C. Ginsburg & Luke A. Budiardjo, *Authors and Machines*, 34 BERKELEY TECH. L. J. 343 (2019), at page 406.
[10] Jane C. Ginsburg & Luke A. Budiardjo, *Authors and Machines*, 34 BERKELEY TECH. L. J. 343 (2019), at page 426.
[11] *Authors, attribution, and integrity: examining moral rights in the United States.* A report of the Register of Copyrights, April 2019.
[12] Jane C. Ginsburg, *The Most Moral of Rights: The Right to be Recognized as the Author of One's Work*, 8 GEO. MASON. J. INT'L COMM. L. 44 (2016).

confidentiality. Generated works that contain inaccuracies and are visually attributable to an artist may be used in a manner adverse to the artist's reputation.

As AI technology advances, its capacity to produce remarkably lifelike and sophisticated artworks is expanding rapidly. Traditional copyright and privacy laws have often protected individuals from unauthorized use of their likeness or image. However, when AI is responsible for generating these likenesses, it blurs the lines of authorship and ownership. Protection should be considered for human artists and creators who can demonstrate that the AI-generated work significantly derives its style, technique, or artistic essence from their own original creations. The criteria for establishing this link must be carefully defined.

AI algorithms should specifically ignore/deny/block prompts to invoke the name of a human visual artist that is still living, or in-copyright (or cultural heritage) protection.