Before the U.S. Copyright Office
Library of Congress
In the matter of Artificial Intelligence and Copyright
Docket No. 2023–6
Statement of Interest by the Music Workers Alliance (MWA)

October 30, 2023

As an organization, we are writing to voice our concerns regarding the use of generative artificial intelligence (AI) from the perspective of independent musicians that hold copyrights and rights of publicity, as well as those that perform and record music.

Let this letter serve as the Music Workers Alliance "statement of interest." We request that these comments be part of the record, and we request to be part of the consultation process moving forward. Below are our responses to selected questions from the NOI.

General Questions

1. As described above, generative AI systems have the ability to produce material that would be copyrightable if it were created by a human author. What are your views on the potential benefits and risks of this technology? How is the use of this technology currently affecting or likely to affect creators, copyright owners, technology developers, researchers, and the public?

The Music Workers Alliance (MWA) joins creative workers from many other fields in viewing unregulated generative AI as an existential threat to our livelihoods. MWA is a worker's center representing musicians who record primarily for indie and self-produced labels, and who also perform and tour live venues and festivals. Our members work as recording artists, band members, songwriter/composers, and side musicians with both indie and major labels, with many receiving income streams from all these sources. All of these streams are either directly or indirectly copyright dependent. As a result, from our perspective, AI threatens to remove crucial and reliable sources of income from musicians and other copyright holders, and in fact is already doing so.

The threat is posed not by AI technology itself, which is already commonly used to clean or extract tracks in the recording process. The threat is posed by those forms of generative AI trained on data obtained without consent of its authors. AI works produced without our consent have the potential to harm our members in myriad ways:

A. By competing with our original works in the marketplace.

B. By reducing already unsustainably low streaming royalties. Spotify et al. calculate payouts by dividing total subscription income among total hits/tracks/artists, and streaming subscription income is already leveling off. If the amount of material uploaded skyrockets, as it surely will when the capacity to produce multiple AI songs per hour emerges, rates will plunge. Further, streaming services will have the capacity to produce and favor their own in-house AI pieces, increasing their profits through streaming material on which no royalties are owed.

C. Film scores are a major source of employment for our members, and film licensing of existing tracks are a major part of the value of audio recordings. While top-end orchestral scores may remain human, much "functional music" work will become non-human As a result of AI, the market for human down-market scoring work, involving composers, arrangers, side musicians, engineers, and studios, will collapse.

D. In order to evaluate generative AI's effect on the public, one must understand the social role of musical culture. In his book, *Noise*, music critic and former French Minister of Finance Jacques Attali theorized that concert music originally accompanied, and eventually substituted for, events whose function was to channel social violence into manageable rituals. His theory explains the tendency of each new form of music to be experienced as "violent" (a phenomenon affecting historic responses to Hayden's "Surprise Symphony," Count Basie's Orchestra, and Elvis Presley's rock as shocking, disturbing, and dangerous, no matter how tame these sound today).

In order to be effective in its role of channeling violence, music's creators must be receptive to the contemporary social triggers and signifiers of violence. AI based music, by definition, cannibalizes musics of the past, and drains resources from the human artists with the exclusive potential to create not simply random "original music," but original music responding to the changing historical conditions and social needs of humans. We question whether generative AI can fulfill the historic (and indeed, pre-historic) social role of music in channeling violence, and we fear the effect on the public of a musical culture in which social violence is no longer channeled into art.

E. Side-musician work, in particular well-paying Union jobs, will be greatly reduced if not eliminated. We note the danger of major labels and larger indies, who own not simply the finished master recordings, but also the multitrack recordings from which the master recordings are "mixed." These multi-tracks usually contain multiple takes, and multiple overdubs within takes. Many labels thus own archives consisting of many thousands of each career studio musician's isolated recorded performances. An AI LLM trained on such archives could effectively replace studio musicianship.

At a recent Senate Judiciary Committee AI hearing, Senator Tillis played a version of an AI generated but recognizable "Frank Sinatra" singing "AI AI" to the tune of "NY NY." The effect was amusing, the AI Frank Sinatra was recognizable, but also recognizably AI. The technology is not fully perfected, but will be in several years. Senator Tillis joked that we shouldn't worry, as the song was "fully licensed."

However, we are unaware of any licensing arrangement under which the side musicians performing on that track will be paid, even though their performance was reproduced note for note. Until now, those wishing to produce a satire recording using tracks of a song recorded under AFM contract had to pay Union reuse fees. But if reuse is taking place on the premises of AI companies which are not signatory to the AFM's contracts, or to any company directly employing or contracting with artists and side musicians, the musicians have no leverage or mechanism for requesting compensation via licensing. The possibility of tracing reuse in AI

generated works that are not exact copies of ingested material will be difficult or impossible. As those AI pieces occupy a larger market share, a mass displacement/defunding of recording musicians will result.

Such mass displacements have occurred before. For example, live music performers were displaced by the growth of the record industry and the advent of sound synchronization in film in the 1930's. But the effect of displacements resulting from unregulated AI would be different in degree and in nature.

The AFM's 90% Union density during the 1930's and 1940's, and the greater flexibility available to Unions prior to the 1948 Taft Hartley amendments to the NLRA, placed the AFM in a powerful position to protect musicians from the effects of the then new disruptive technologies (the mass recording industry, sound synch, national radio networks, etc.). Although the Union failed to prevent the use of sound synchronization in film, the AFM's 1942 and 1948 strikes against the major recording companies successfully shut down the industry for over a year. The concessions won not only blunted the transition to new economies for the displaced live musicians, but ensured that those employed in the new recording technology industries would be well compensated.

The Music Performance Trust Fund (negotiated with the major labels) was, for many decades, the largest single employer of musicians in the US. This and other Union negotiated funds (like the Film Musicians Secondary Market and Film Musicians Special Payment Fund) greatly eased the impact of disruption. And the new technologies enabled new generations of Unionized studio musicians to be employed in their craft at rates that, for side musicians, remain among the highest in the world.

Crucially, there is no equivalent possibility of compensatory benefits if unregulated AI displaces the work of recording musicians. Due to Taft Hartley restrictions, the growth of the non-Union indie sector, and other factors, Union density in recording is a fraction of what it was in the 1940's. The Union is in a much less powerful position to make and negotiate demands. Consequently, there will be no re-employment of contemporary musicians or newer generations of creative artists within an unregulated generative AI musical culture. Without regulation, musicians will be effectively forced to train our own permanent replacements, and then driven permanently outside the recorded music economy.

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?

Our members are working musicians. Although many have performed as side musicians with top major label artists, most are middle or down-market artists, side musicians, and songwriters. As such, although we would benefit indirectly from an effective right of publicity and any other legislation that protects the human music ecosystem, we are mostly dependent on copyright.

5. Is new legislation warranted to address copyright or related issues with generative AI? If so, what should it entail? Specific proposals and legislative text are not necessary, but the Office welcomes any proposals or text for review.

It is essential that congress create no additional Fair Use exemptions, Safe Harbors, or other waivers of copyright to facilitate the development of AI. Our members have already been severely and negatively impacted by Congress's failure to implement the USCO's 5/21/2020 recommendations to address the imbalances in Section 512 DMCA Safe Harbors.

Training

6.1. How or where do developers of AI models acquire the materials or datasets that their models are trained on? To what extent is training material first collected by third-party entities (such as academic researchers or private companies)?

Many AI models obtain access to our work through ingestion of material obtained from third party scraping and ingestion, without our consent, credit, or compensation.

6.2. To what extent are copyrighted works licensed from copyright owners for use as training materials? To your knowledge, what licensing models are currently being offered and used?

None of us have ever been approached for such a license.

8.5. Under the fourth factor of the fair use analysis, how should the effect on the potential market for or value of a copyrighted work used to train an AI model be measured? Should the inquiry be whether the outputs of the AI system incorporating the model compete with a particular copyrighted work, the body of works of the same author, or the market for that general class of works?

It is essential that the inquiry be focused on the actual or potential impact on the class of works. AI models are wholly derivative, but outputs are generally a blend of a variety of works, no one of which may be immediately recognizable as deriving from a particular work. In this environment, the only test that makes any sense is to explore the impact on a broad category of 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 solution capable of actually protecting music creators. Previous experience with opt out shows that such a right has not been accessible to many creators. Further, any copyrighted work that has been used without authorization and compensation should be removed from data sets until authorization by the copyright holder is obtained and they are fairly compensated. The FTC has existing authority to order the disgorgement of algorithms which were unethically sourced. It is hard to imagine something more unethical than use of creative works without the consent of creators in order to develop models that threaten to make the lives of creative workers even more precarious.

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

All uses.

9.3. What legal, technical, or practical obstacles are there to establishing or using such a process? Given the volume of works used in training, is it feasible to get consent in advance from copyright owners?

The feasibility of generative AI corporations following the law should not be the concern of creative workers or of the U.S. Copyright Office. We are talking about AI systems that, if unregulated, will leave 300 million humans unemployed, disrupt not just industries but human culture itself, and accelerate global warming. The protection of all the above must be the priority of government, not considerations secondary to the feasibility of a new technologically-based business model.

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?

No action should be taken by Congress which serves to shield generative AI models from liability for infringement. We also urge the Copyright Office to work with Congress and be prepared to quickly adopt legislation in the event that unauthorized commercial scraping and copying is ruled to be consistent with existing law. In such circumstances, time will be of the essence in acting quickly to preserve America's cultural workers.

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

Licenses should be obtained through direct licensing, including through voluntary collective licensing. Major rightsholders are likely to directly license. Independents, should they wish their works to be used for training, can create new licensing bodies, or, more likely, can vest authority in existing collective management organizations.

10.3. Should Congress consider establishing a compulsory licensing regime? If so, what should such a regime look like? What activities should the license cover, what works would be subject to the license, and would copyright owners have the ability to opt out? How should royalty rates and terms be set, allocated, reported and distributed?

Once the sounds and styles music workers have spent our lives perfecting have been ingested in a generative AI data bank, it will likely be very difficult to detect the myriad uses to which they will be put. This will create significant obstacles to our ability to quantify, and to fairly monetize, the use of our works. It may be that the point of authorizing ingestion is the only realistic point for licensing. Given the novelty of this situation, we believe a regime of compulsory licensing would be completely inappropriate. It is essential that we clarify that ingestion requires consent, and that creative parties are fairly compensated.

The Copyright Office should also take action to ensure, to the greatest extent possible, that AI services use available metadata in a robust fashion so that rightsholders can determine

downstream uses of works in the AI database. That will facilitate licensing and help to ensure that all of the creative parties are fairly compensated. The importance of metadata and transparency must not be overlooked.

13. What would be the economic impacts of a licensing requirement on the development and adoption of generative AI systems?

A fair distribution of wealth to the workers who created the knowledge base that AI has trained on is not only necessary for the continued funding of a cultural process that enables new works that respond to new historic conditions, emerging human needs, and new human creative potentialities. Putting more money in the hands of workers who actually pay taxes at a higher rate than corporations is also a better model for economic and social stability. The G6 have recently acknowledged the need for greater regulation and higher taxation of corporations, and the extreme divisions of wealth in the U.S. are acknowledged as a driver of economic, social, and political instability.

Transparency & Recordkeeping

16. What obligations, if any, should there be to notify copyright owners that their works have been used to train an AI model?

Copyrighted works should not be used without authorization. Please see our comment on 17., below.

17. Outside of copyright law, are there existing U.S. laws that could require developers of AI models or systems to retain or disclose records about the materials they used for training?

MWA would like to note and support the concept of the current French proposal to require consent of creators prior to use, as well as for the labeling of AI output.

Infringement

22. Can AI-generated outputs implicate the exclusive rights of preexisting copyrighted works, such as the right of reproduction or the derivative work right? If so, in what circumstances?

We believe that many if not most of the works will affect the existing rights of copyright holders and refer to the Supreme Court decision in Warhol.

23. Is the substantial similarity test adequate to address claims of infringement based on outputs from a generative AI system, or is some other standard appropriate or necessary?

Substantial similarity is adequate to address some claims but not some of the unique problems presented by AI scraping and ingestion which may require legislation. It is difficult to advise on the precise scope of such legislation while cases such as Universal et al. v. Anthropic are before the courts.

Additional Questions About Issues Related to Copyright

30. What legal rights, if any, currently apply to AI-generated material that features the name or likeness, including vocal likeness, of a particular person?

We support an effective and federal right of publicity.

As an organization, the Music Workers Alliance looks forward to being part of this continued process.

musicworkersalliance@gmail.com