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Before the United States Copyright Office
Library of Congress

Comment from the Center for Art Law in response to Request for Comments on Artificial Intelligence and Copyright

Docket No. 2023-6

This is a submission from the Center for Art Law in response to the Request for Comments on Artificial Intelligence (AI) and Copyright from the United States Copyright Office. The Center's response addresses the copyright issues raised by generative AI, namely issues "involved in the use of copyrighted works to train AI models, the appropriate levels of transparency and disclosure with respect to the use of copyrighted works, and the legal status of AI-generated outputs."[1] This submission presents the following:

1. When using copyrighted works to train AI models, the output matters;
2. Businesses must be required to disclose when copyrighted works are used to generate AI content;
3. The U.S. Copyright Office's "human authorship" approach is the right approach for determining the legal status of AI-generated outputs; and
4. Any rule or law around AI and copyright must account for artists' perspectives, including protecting artists while allowing collaboration with AI tools.

The Center for Art Law (the "Center") is a Brooklyn-based not-for-profit research organization dedicated to protecting and promoting artists' rights and providing educational resources and programming in the areas of art and law. Here, the Center shares information about the legal implications of AI and possible concerns for visual artists, keen on both protecting their work as well as using AI as a tool in their creative process.

Launched in 2009 as an online resource, the Center is a go-to leader in the field that provides learning opportunities to a worldwide community. Today, the Center is the only independent art law entity in the U.S. dedicated to writing, gathering, and sharing law and visual arts information for the benefit of artists, students, lawyers, academics, and many more. For this response, the Center draws on its experience serving and uplifting the art community, including providing educational resources and publishing research related to artists' moral rights and copyright.

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[1] 88 Fed. Reg. 59,942 (Aug. 30, 2023).

I. When Using Copyrighted Works to Train AI Models, the Output Matters.

One of the greatest artists of the modern times, Pablo Picasso is credited with the famous quote that "good artists copy and great artists steal." Born in Spain, Picasso lived most of his life in France, the country that was the first to adopt stringent artists' rights laws and the pioneer in offering resale royalty rights to visual artists. Traditionally, copying works of their predecessors and contemporaries was not only acceptable but expected for the new artists to learn the visual vocabulary and to proceed with creating something new.

While there is no federal resale royalty right for visual artists in the United States, there are limited moral rights and there is an attempt to balance the rights of copyright holders (17 U.S.C. § 106) and public benefit by granting fair use (17 U.S.C. § 107), establishing permissible exceptions to copyright infringement. The use of visual content to train future content creators could qualify for the fair use defense in some circumstances; however, the nature of the output produced by AI, as well as the unprecedented scale, threatens the livelihood and rights of human copyright holders.

17 U.S.C. § 107 establishes the fair use defense to copyright infringement, putting forth the following factors:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.[2]

Historically, the fair use doctrine shielded individual artists, educators, researchers, and parodists from copyright infringement, allowing the public to remix, reimagine, and comment on works produced by more established or institutional copyright holders.[3] More recently, tech companies have begun exploiting fair use, invoking it to justify scraping troves of images that took artists hours, days, months, or even years to create. Benjamin L. W. Sobel offers an apt description of the current state of copyright and fair use:

> Today's digital economy upends this narrative. . . . Powerful technology companies are now users of copyrighted material, and the companies' end users

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[2] 17 U.S.C. § 107.
[3] Benjamin L. W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 COLUM. J.L. & ARTS 45 (2017).

are the rights holders. This pivot in market dynamics should prompt a corresponding shift in attitudes towards fair use. The doctrine no longer redistributes wealth from incumbents to the public; it shifts wealth in the other direction, from the public to powerful companies.[4]

To that end, the use of copyrighted works to train generative AI tools does not necessarily constitute fair use. The first and fourth factors have generally been given the most weight. Since the Supreme Court's 1994 ruling in *Campbell v. Acruff-Rose Music*, the first factor has remained the most outcome-determinative factor.

This status quo has remained in place even in the Supreme Court's recent decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, where the Court limited its inquiry to the first fair use factor.[5] Still, the Court's emphasis on Warhol's silkscreen portrait of Prince and Goldsmith's photo of Prince serving the same licensing market shares striking similarities to a fourth factor analysis.[6] Ultimately, the fourth fair use factor "focuses on whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original."[7]

In connection to the Fair Use Factor #1: Using Copyrighted Works to Train AI Systems is Not Necessarily a Transformative Use.

The first fair use factor analyzes the "purpose and character" of the use, including whether the use is "of commercial nature."[8] The central question of this analysis is whether the use "merely 'superede[s] the objects' of the original creation . . . or instead adds something new, with a further purpose . . . in other words, whether and to what extent the new work is 'transformative.'"[9]

Generative AI has the potential to be a valuable technology, one that may augment artists' creative process, but that does not render all AI training on copyrighted works inherently transformative. Accordingly, "AI learning to generate content that serves the same aesthetic, expressive, or functional purpose as the training data is likely not transformative."[10] With respect to AI-generated content, "all the functional transformation . . . stays 'inside' . . . and goes unnoticed by the end user (the art goes in, and the art goes out)."[11]

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[4] *Id.* at 85.
[5] 598 U.S. __ (2023).
[6] Patrick K. Lin, *Retrofitting Fair Use: Art & Generative AI After Warhol*, 64 Santa Clara L. Rev. (*forthcoming* 2024).
[7] *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d Cir. 2015).
[8] 17 U.S.C. § 107(1).
[9] *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994) (quoting Justice Story's discussion in *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).
[10] Lin, *supra* note 5.
[11] Diana Bikbaeva, *AI Trained on Copyrighted Works: When Is It Fair Use?*, Lexology (Jan. 16, 2023), https://www.lexology.com/library/detail.aspx?g=aebf2d90-fab5-45d3-bfa5-9a9b0401c811.

Tech companies may argue the use of copyrighted material to train AI systems is fair use because it is "non-expressive." This distinction hinges on the difference between human-made arts' "entertainment" purpose and training data's objective to learn "patterns inherent in human-generated media."[12] However, the system output still matters.

Although tech companies have attempted to parse out "entertainment" and "learning" purposes in AI training data, the end user does not use generative AI tools "to learn the unprotected technical or factual information about the copyrighted training data."[13] In his article on transformative use, Judge Leval emphasized careful evaluation of "whether the particular quotation is of the transformative type that advances knowledge and the progress of the arts or whether it merely repackages, free riding on another's creations."[14] The end user prompts these AI tools to generate content that is both "entertaining" and "expressive."[15] In fact, these AI tools are often "merely repackaging creations of another."[16]

In connection to the Fair Use Factor #2: The Nature of AI Models Depends on the Copyrighted Works Used.

While this factor "has rarely played a significant role in the determination of a fair use dispute,"[17] the application of this factor provides case-by-case flexibility. This factor weighs in favor of fair use for factual information.[18] In contrast, to the extent that an AI tool relies on expressive works to train its underlying system, this factor would weigh against fair use.[19] As a result, the use of previously created artwork to train AI models to produce images is likely weighed against a fair use finding.

There have certainly been productive and publicly beneficial uses of copyrighted works in the AI space, such as limiting bias in natural language processing (NLP) systems by incorporating training data that includes creative works with nuanced language like vernacular and sarcasm.[20] Such benefits cannot be derived from scraping the internet for human-made art to train AI image generators.

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[12] *E.g.*, OpenAI, Comment Regarding Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation (2020), https://www.uspto.gov/sites/default/files/documents/OpenAI_RFC-84-FR-58141.pdf.

[13] Bikbaeva, *supra* note 10.

[14] Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990). In his seminal article, Judge Leval wrote "Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses. The existence of any identifiable transformative objective does not, however, guarantee success in claiming fair use. The transformative justification must overcome factors favoring the copyright owner."

[15] Bikabeva, *supra* note 10.

[16] Leval, *supra* note 13.

[17] *Authors Guild*, 804 F.3d at 220.

[18] *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

[19] *Id.* ("[A] use is less likely to be deemed fair when the copyrighted work is a creative product.").

[20] Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem*, 93 Wash. L. Rev. 579, 626 (2018).

In connection to the Fair Use Factor #3: Wholesale Scraping of Copyrighted Works on the Internet to Train AI Models is Unreasonable.

The third factor evaluates the "amount and substantiality of the portion [taken]."[21] Although copying the entirety of a work "does not preclude fair use per se, . . . copying an entire work militates against a finding of fair use."[22] Federal courts have regularly found that wholesale copying can be necessary for certain purposes, particularly "when the copying was reasonably appropriate to achieve the copier's transformative purpose and was done in such a manner that it did not offer a competing substitute for the original."[23] In other words, whether the third factor weighs in favor of fair use hinges on the first and fourth factors.

In connection to the Fair Use Factor #4: AI-Generated Work is Effectively a Market Substitute for Human-Created Art.

The fourth fair use factor "focuses on whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original."[24] It follows that if an AI-generated work and a human-created work serve the same market, the AI-generated work is effectively a market substitute for the human-created work.

Generative AI tools, particularly AI image generators, are often prompted to output works that are "in the style of" specific artists, producing works designed to directly compete with that artist's work.[25] Here, the fourth factor can be a valuable counterweight to the first factor. Specifically, "even if a court finds that an AI-generated image used an artist's original work for a 'transformative' purpose, it can conclude that, on balance, the negative effect on the artist's licensing market weighed against fair use."[26] The advent of generative AI may result in a renewed interest in market competition and market impact in future fair use cases involving the technology and its outputs, potentially shifting the focus on whether AI-generated content replaces and competes with the original work.[27]

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[21] 17 U.S.C. § 107 (2012).

[22] *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000).

[23] *Authors Guild*, 804 F.3d at 221.

[24] *Id.* at 223.

[25] *E.g.*, Melissa Heikkilä, *This Artist Is Dominating AI-Generated Art. And He's Not Happy About It.*, MIT TECH. REVIEW (Sept. 16, 2022), https://www.technologyreview.com/2022/09/16/1059598/this-artist-is-dominating-ai-generated-art-and-hes-not-happy-about-it/ (reporting how artist Greg Rutkowski has become a more popular AI image prompt than Michelangelo, Pablo Picasso, and Leonardo da Vinci combined); Andy Baio, *Invasive Diffusion: How One Unwilling Illustrator Found Herself Into an AI Model*, WAXY (Nov. 1, 2022), https://waxy.org/2022/11/invasive-diffusion-how-one-unwilling-illustrator-found-herself-turned-into-an-ai-model/ (reporting how a Redditor used illustrator Hollie Mengert's artwork to train Stable Diffusion to recreate works in her style).

[26] Lin, *supra* note 5.

[27] *Id.*

Under current law, ingesting copyrighted works to train AI systems does not automatically constitute fair use. Recognizing the preeminence of the first and fourth fair use factors, the Center finds the most recent interpretations of these factors in the Supreme Court's *Warhol* decision, as well as decisions in lower courts,[28] demonstrate that AI-generated images will and have harmed the market for or value of copyrighted works in training datasets.

AI systems have the potential to yield societal benefits, such as translating languages, answering complex and technical questions, and even completing mundane or dangerous tasks. Yet AI companies, Hollywood studios, and grifters alike have made a concerted effort to undermine the meaningful and often undervalued labor of actors, writers, and artists. "Fair use redistributes economic and expressive power. . . . If the doctrine develops to give carte blanche to expressive machine learning, it will redistribute in the opposite direction: it will serve the economic interests of incumbent firms at the expense of disempowered rights holders."[29] Accordingly, it is the Center's position that creative expression remains a human endeavor, and the law of copyright is uniquely positioned to protect human artists.

II.   Businesses Must Be Required to Disclose When Copyrighted Works Are Used to Generate AI Content.

Requiring businesses to disclose the use of copyrighted works contributes to transparency in the development of AI. It ensures that consumers, stakeholders, and the general public have a clear understanding of the sources of data and content used in training AI models. Transparency is an ethical imperative, especially when AI systems are trained on copyrighted works created by other artists. Disclosing such usage respects the intellectual property rights of original creators and promotes fair and ethical practices in the AI industry. Providing information about the copyrighted works used in AI training allows businesses to give proper attribution and credit to the original creators. This is crucial in cases where AI-generated content becomes commercially successful, ensuring that the contributing artists are acknowledged and compensated for the works. In addition, it allows artists to "opt-out" if they find that their work is trained in a data set since it includes copyrighted images that belong to other artists.

The Federal Trade Commission has made clear that certain deceptive AI content ownership claims fall within the well-established principles of unfairness and deception under Section 5 of the FTC Act. For instance, failing to disclose the use of intellectual property in training data or misleading creators about content ownership, such as using users' content to train AI algorithms or generate new content without clear disclosure upfront, are likely deemed deceptive practices

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[28] *E.g.*, *Thaler v. Perlmutter*, Civil Action No. 22-1564 (BAH) (D.D.C. Aug. 18, 2023).
[29] Sobel, *supra* note 3 at 88.

under the FTC Act. Similarly, passing off AI content as human-generated content would be a clear example of false advertising.[30]

To address these concerns, including a backlash from the art community, some AI companies have already started to make their own adjustments. For example, companies like Adobe, Amazon, Google, IBM, Microsoft, and Shutterstock have included and advertised indemnity provisions, offering their customers protection from copyright infringement.[31] These companies often achieve this by exclusively training their AI models on open-source content or content obtained with permission. Some companies are also including digital signatures to indicate when images are created with generative AI applications.

Businesses should prominently display information on their websites about the technologies and software used in training their AI models. This can include details about the algorithms, datasets, and any copyrighted works involved. Having dedicated disclosure statements accessible on the website ensures that users can easily find and review the information about AI development practices. This statement should explicitly address the use of copyrighted materials. AI technologies evolve, and so should disclosure practices. Businesses must commit to updating their disclosure statements as their AI models are refined or as they incorporate new data sources.

III. The U.S. Copyright Office's "Human Authorship" Approach Is the Right Approach for Determining the Legal Status of AI-Generated Outputs.

In February 2023, the U.S. Copyright Office correctly determined that works produced solely by AI are not eligible for copyright protection, declaring that outputs from AI image generators cannot be copyrighted because those images are considered "non-human authorship."[32] A month later, the Copyright Office provided its first-ever formal guidance on the issue of generative AI: works made with the assistance of AI may be copyrightable, but only if the work involves sufficient "human authorship."[33]

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[30] Michael Atleson, *Can't Lose What You Never Had: Claims about Digital Ownership and Creation in the Age of Generative AI*, Federal Trade Commission (Aug. 16, 2023), https://www.ftc.gov/business-guidance/blog/2023/08/cant-lose-what-you-never-had-claims-about-digital-ownership-creation-age-generative-ai.

[31] *E.g.*, Neal Suggs and Phil Venables, *Shared Fate: Protecting Customers with Generative AI Indemnification*, Google Cloud (Oct. 12, 2023), https://cloud.google.com/blog/products/ai-machine-learning/protecting-customers-with-generative-ai-indemnification; *Firefly IP Indemnification*, Adobe Firefly (Sept. 13, 2023), https://helpx.adobe.com/legal/product-descriptions/adobe-firefly.html.

[32] Letter from Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice, U.S. Copyright Office, to Van Lindberg, Counsel to Copyright Applicant Kristina Kashtanova (Feb. 21, 2023), https://copyright.gov/docs/zarya-of-the-dawn.pdf ("Because of the significant distance between what a user may direct Midjourney to create and the visual material Midjourney actually produces, Midjourney users lack sufficient control over generated images to be treated as the 'master mind' behind them . . . . The fact that Midjourney's specific output cannot be predicted by users makes Midjourney different from copyright purposes than other tools used by artists.").

[33] *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, 88 Fed. Reg. 16,190 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202) ("In the [Copyright] Office's view, it is well-established that copyright can protect only material that is the product of human creativity. Most fundamentally, the term 'author,' which is used in both the Constitution and the Copyright Act, excludes non-humans.").

The Center agrees with the U.S. Copyright Office's reasoning for denying copyright protection with respect to AI-generated art. This human authorship requirement ensures that copyright protects human artists and creators, not machines and corporations.

In our view, images and works produced solely with AI image generators should not be afforded copyright protection. As the U.S. Copyright Office has held, significant human intervention is required. The Center also believes that this might be the time for Congress to codify the U.S. Copyright Office approach. Furthermore, although the White House has received pledges from the likes of OpenAI and Google to watermark AI-generated content, such pledges lack enforceability.[34] Requiring watermarks on AI-generated images may allow individuals to experiment with generative AI applications without jeopardizing the livelihood of artists. As a result, the Center supports the FTC's approach to unfair and deceptive claims about generative AI and AI content, particularly when artists' IP are involved.

IV. Any Rule or Law Around AI and Copyright Must Account for Artists' Perspectives, Including Protecting Artists While Allowing Collaboration with AI Tools.

In December 2022, digital artist Ben Moran was banned from the r/Art subreddit on Reddit for posting an image that moderators believed violated their "no AI art" rule.[35] Despite Moran's claims of authorship and willingness to provide proof, moderators insisted the artwork appeared AI-generated. The incident raises concerns about the challenges artists face in proving the authenticity of their work, as AI can create art quickly and inexpensively. It is particularly interesting to note as the subreddit was created to protect human creators and allow them to share their work but it ended up banning a human artist condemning them for work created that could be similar to AI generated work.[36]

When artists navigate the digital realm, they face a myriad of challenges that demand a proactive approach to safeguard their creations. Unauthorized reproduction poses a constant threat, as AI can effortlessly churn out copies, diluting the exclusivity of the original piece. Deepfakes and manipulations orchestrated by AI further complicate matters, potentially tarnishing an artist's reputation.

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[34] Ryan Heath and Ashley Gold, *White House Gets AI Firms to Take Safety Pledge*, Axios (July 21, 2023), https://axios.com/2023/07/21/white-house-ai-firms-safety-pledge.
[35] Samantha Cole, *'I Don't Believe You:' Artist Banned from r/Art Because Mods Thought They Used AI*, Vice (Jan. 2023), https://www.vice.com/en/article/y3p9yg/artist-banned-from-art-reddit.
[36] *See* Atreya Mathur, *Art-istic or Art-ificial? Ownership and copyright concerns in AI-generated artwork,* Center for Art Law (November 2022), https://itsartlaw.org/2022/11/21/artistic-or-artificial-ai/

To tackle these issues, artists should adopt strategic measures. For example, watermarking and signatures act as visible deterrents, signaling ownership. Embedding metadata and copyright information within digital files serves as a protective layer of evidence. Registering artwork with copyright offices establishes legal advantages when pursuing infringement cases but with AI generated images, such artworks do not qualify for copyright protection. Collaborations with AI should receive protection to the extent of human involvement and creativity as a "selection and arrangement."[37] However, the metadata could also be used to prove ownership and creation for the purpose of registering copyright and identify what has been created with AI so appropriate protection can be afforded to human-generated collaborative artworks.

Some artists delve into blockchain technology, leveraging it to create digital certificates of authenticity.[38] This innovative approach aids in tracing and confirming ownership, offering a new frontier in the battle against unauthorized use. Monitoring online platforms is also crucial. Regular searches for artwork can uncover instances of infringement, and automated tools can streamline this process. Embracing AI as a creative tool is not just a defensive move but a strategic one—artists who actively engage in discussions about AI and art can influence the narrative and potentially shape legal frameworks.

Select Artists' Best Practices

- **Watermarking:** Artists are encouraged to incorporate subtle watermarks into their images. While it may not entirely thwart theft, this practice can discourage individuals from utilizing their work without proper authorization.
- **High-Resolution Previews:** Opt for sharing low-resolution versions of artwork online. This strategic approach diminishes the appeal for unauthorized use by those seeking to exploit the work.
- **Metadata and Copyright Information:** Embed pertinent copyright details and contact information within the metadata of files. This serves as crucial evidence of ownership in the event of any disputes.
- **Use Digital Signatures:** Contemplate the use of digital signatures or certificates to validate the authenticity of artistic work. Blockchain technology, currently under exploration, holds promise for enhancing this verification process.
- **Monitor and Search:** Consistently conduct online searches for work through tools like reverse image search to identify potential instances of unauthorized use. Automation services are available to streamline this monitoring process.

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[37] Stephen Wolfson, Zarya of the Dawn: US Copyright Office Affirms Limits on Copyright of AI Outputs, CREATIVE COMMONS (February 27, 2023), https://creativecommons.org/2023/02/27/zarya-of-the-dawn-us-copyright-office-affirms-limits-on-copyright- of-ai-outputs/; Letter from Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice, U.S. Copyright Office, to Van Lindberg, Counsel to Copyright Applicant Kristina Kashtanova (Feb. 21, 2023), https://copyright.gov/docs/zarya-of-the-dawn.pdf.

[38] *See* Anuradha Varanasi, *AI Art Is Here To Stay — How Blockchain Can Help Creators Gain Control Over Their Work,* THE DATA SCIENCE INSTITUTE AT COLUMBIA UNIVERSITY (Mar. 28, 2023),
https://datascience.columbia.edu/news/2023/ai-art-is-here-to-stay-how-blockchain-can-help-creators-gain-control-over-their-work/

- **Terms of Use on Website:** Clearly outline the terms of use for the work on the artists' website or portfolio. Establish unambiguous boundaries regarding what is permissible and what is not.

While artists may have to take the above mentioned measures to protect their work, AI software companies also need to include provision on their website and software user agreements protecting the interests of artists. This should be a requirement of AI software providers to let artists have a stronger hold on what their rights are and what artwork they are licensing.

Terms of Contract for Artists with AI Software User Agreements

Protecting artists in the context of AI-generated art involves establishing clear policies that address concerns related to consent, style replication, and collaborations. For these considerations to be successful, consent needs to be taken from the artists with provision to opt-in and out which means only license free and open source material can be fed into the AI for training and generating output unless artists explicitly opt-in for the same. If that is too challenging, an opt-out provision needs to be adopted though artists will then have to take the difficult role of monitoring and opt-ing out of several platforms.

Included below are a list of considerations for user agreements and contracts for AI tools and applications.

- **Informed Consent:** Clearly state in the platform's terms of service that artists' work will not be used in AI systems without their explicit and informed consent.
- **Opt-In or Opt-Out Mechanism:** Implement an opt-in system where artists can choose whether or not to allow their work to be used for AI purposes. Make this process transparent and easily accessible. An Opt-Out provision should be provided in any other case.
- **Data Protection:** Emphasize the importance of data protection and ensure that artists' work is handled in accordance with relevant privacy laws. Clearly communicate how their data will be used and protected.
- **Exclusivity Options:** Provide artists with the option to specify whether their work can be exclusively used within the platform or if they retain the right to share it elsewhere.
- **Revocable Consent:** Clarify that artists have the right to revoke their consent at any time, giving them control over the use of their work in AI systems.
- **Style Replication Prohibition:** Clearly state in the terms of service that users are prohibited from using AI systems to replicate the specific styles of individual artists without their consent. A block should be implemented to not input the names of artists to mimic a certain style.[39]

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[39] *See* DALL·E 3, OPENAI, https://openai.com/dall-e-3 (last visited Oct. 24, 2023).

- **User Reporting Mechanism:** Implement a user reporting mechanism for instances where artists believe their style has been replicated without consent. Act promptly to investigate and address reported cases. Measures for complaints and take-downs should be in place if they find artists' work is used. Artists should be compensated for the same and images should be removed.
- **Legal Consequences:** Clearly outline the consequences of violating the prohibition on style replication, including potential legal action and termination of user accounts.

Disclosures for AI Collaborative Works and the Use of Digital Signatures on Blockchain

To protect the work of human artists and allow for their work to be distinguished from artwork generated by AI, the Center agrees with the Copyright Office that disclosures need to be made when artwork includes any component which is AI generated. Transparency is crucial. Disclosing AI-generated content in the submission process ensures that the Copyright Office and other relevant parties are aware of the involvement of artificial intelligence in the creative process. The platforms or models used to generate any component of the work should also be disclosed so there is a check on any platforms that may be training AI in any unethical manner in the present or if future issues arise.

In general, copyright protection is granted to original works of authorship. While many AI systems can generate creative content, the question of authorship becomes central. By disclosing AI involvement, it becomes clearer whether a human artist was involved in the creative decision-making process to grant protection or limited protection to AI generated works. Copyright law is intended to incentivize human creativity. Disclosing AI involvement helps in preserving the original intent of copyright law by ensuring that humans remain central to the creative process. Disclosing AI-generated content in works submitted for copyright protection is a proactive and ethical step. It promotes transparency, addresses legal considerations, and contributes to providing necessary protection of artist interests.

It may also be helpful to have watermarks or a "digital signature" as discussed above which the software can produce for AI generated images to ensure such work can be identified and appropriate protection or measures can be taken to grant the work copyright registration or not.[40]

Watermarking and digital signatures, especially when implemented on blockchain technology, can play a crucial role in identifying AI-generated work and addressing the complexities associated with the attribution and ownership of such content. Embedding a unique identifier within the digital content can serve as a digital signature for the work. For AI-generated content,

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[40] *See* Hany Farid, *How Watermarks Can Help Protect against Fraud with Generative AI like ChatGPT,* Fast Company *(2023),* https://www.fastcompany.com/90871934/how-watermarks-can-help-protect-against-fraud-with-generative-ai-like-chatgpt

this can include information about the AI model used, the parameters, or other details that indicate the specific instance of AI involved. This helps establish a clear connection between the work and the AI technology. Digital signatures on blockchain also creates an unalterable record of the ownership and creation of the work. Blockchain provides a timestamp for each transaction or record. This timestamp can be crucial in establishing the chronological order of content creation, helping to resolve disputes about the original creator. Smart contracts on blockchain can automate certain aspects of copyright management. For instance, they can enforce licensing agreements, automate royalty payments, or specify the conditions under which the content can be used. Blockchain's transparency ensures that the history of a digital asset, including its creation and ownership, is accessible to all relevant parties. This transparency builds trust in the authenticity of the information recorded. Blockchain also provides a decentralized and cross-platform solution. Once a digital signature is recorded on a blockchain, it can be verified by anyone with access to the blockchain network, irrespective of the platform where the content is hosted. It can facilitate interoperability between different systems and platforms, making it easier to track and verify the authenticity of content across the digital landscape. Combining watermarking techniques with digital signatures on blockchain provides a robust solution for identifying AI-generated work. It ensures transparency, tamper resistance, and a reliable record of ownership.

V.   Conclusion

The fundamental purpose of copyright law is to provide limited monopoly to the creator to encourage their work. There seems to be little need to "incentivize future AI related innovations and creations."[41] In the recent decision *Thaler v. Perlmutter*, the Court clearly indicated that machine-produced output need neither monopoly to be incentivised to produce nor capacity for artistic labor. The image thus described was generated by "Creative Machine" and entitled "The Recent Entrance to Paradise."[42] It likely incorporated imagery from the work of Claude Monet collaged with other elements. While we may agree that works of Impressionist artists have much appeal, output generated by machines based on human-generated content over the millenia should be clearly labeled as such "AI-generated" and treated more as a fungible rather than a unique and protectable property. It would follow that art that includes AI-generated content PLUS human authorship would be treated like any other work of art, with medium listed: Oil, charcoal, wood, Stable Diffusion, etc.

In conclusion, the Center for Art Law's submission acknowledges the significance of the output generated by AI when using copyrighted works for training, emphasizing the potential impact on the livelihood and rights of human copyright holders. The Center advocates for a mandatory

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[41] *See* Letter from Thom Tillis, United States Senator and Chris Coons, United States Senator, to Honorable Kathi Vadal, Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office, U.S. Patent and Trademark Office and Shira Perlmutter, Register of Copyrights and Director, U.S. Copyright Office (October 27, 2023), https://www.copyright.gov/laws/hearings/Letter-to-USPTO-USCO-on-National-Commission-on-AI-1.pdf
[42] *Thaler v. Perlmutter*, Civil Action No. 22-1564 (BAH) (D.D.C. Aug. 18, 2023).

requirement for businesses to disclose when copyrighted works are used to generate AI content. This disclosure is seen as essential for transparency, ethical practices, and fair attribution to original creators. The Center supports the U.S. Copyright Office's stance that works produced solely by AI are not eligible for copyright protection and highlights the importance of human authorship in determining the legal status of AI-generated outputs. The submission also stresses the need for any rule or law regarding AI and copyright to consider artists' perspectives. It proposes best practices for artists, including watermarking, high-resolution previews, metadata inclusion, and engaging in discussions to influence legal frameworks and recommends establishing clear policies in user agreements for AI tools, emphasizing informed consent, opt-in/opt-out mechanisms, data protection, exclusivity options, and consequences for style replication. The Center also advocates for disclosures when AI-generated components are part of collaborative works and suggests the use of digital signatures on blockchain as a means of identifying and protecting AI-generated content.

The submission underscores the need for a balanced approach that protects the rights of human artists while recognizing the potential benefits of AI in the creative process. It emphasizes the role of transparency, ethical considerations, and legal frameworks in ensuring the fair and responsible use of AI in the realm of copyright and artistic expression.

Respectfully Submitted,
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