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Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC

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In the Matter of	)	
	)	
Artificial Intelligence and Copyright	)	Docket No. 2023–6

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COMMENTS OF NATIONAL PUBLIC RADIO, INC.

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I.   INTRODUCTION

National Public Radio, Inc. ("NPR") is pleased to submit these Comments in response to the U.S. Copyright Office's Notice of Inquiry and Request for Comments on Artificial Intelligence and Copyright published in the Federal Register on August 30, 2023 ("NOI").[1]

NPR is a non-profit membership corporation that produces, acquires, and distributes programming to approximately 1,100 noncommercial public radio stations nationwide. NPR also distributes content directly to its audiences through its website NPR.org, the NPR One and NPR smartphone apps, smart speakers, NPR podcasts, and natively on many social media platforms. NPR provides a variety of services to its Member organizations, including digital services and representation of public radio's collective interests in public policy matters.

At the local level, NPR Members and other public radio stations are independently owned, noncommercial organizations dedicated to providing important public services for their communities, including life-saving public safety and emergency alerting and noncommercial

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[1] *Artificial Intelligence and Copyright*, Notice of Inquiry and Request for Comments, 88 Fed. Reg. 59,942 (Aug. 30, 2023).

educational news, information, and cultural programming. Public radio stations reach nearly 99 percent of the U.S. population over the air, broadcasting news and information to urban, rural, and underserved areas of the country.

Public radio provides essential daily news, filling the gap for news and information in America's communities with expanded local and regional coverage. As other sources of local news have declined over the past decade, public radio stations have increased newsroom positions—expanding our ability to bring trusted, reliable, and independent news and information of the highest editorial standards to listeners in communities across the country. Public radio stations now support approximately 2,900 local journalists serving their communities with daily news. NPR supports stations in providing local journalism of the highest standard through collaborative efforts, such as four regional newsrooms in the Gulf States, Midwest, Texas, and California and collaborative teams that support investigative journalism or combine reporting resources across stations on specific issues like agriculture and climate.

Beyond news and information, public radio music-format stations have a key role in supporting noncommercial music in the United States, playing a broad collection of sounds and styles including jazz, blues, classical, folk, alternative, bluegrass, zydeco, roots, and other eclectic genres, and highlighting local artists and music performances. This work supports music discovery and promotes local, emerging artists and local music ecosystems, which rely upon the protections of music copyright for compensation of their works.

Public radio also plays a critical role in civil defense. The authenticity of information during times of emergency is essential, and public radio is a trusted, authoritative source of information before, during, and after disasters. NPR operates the Public Radio Satellite System® ("PRSS"), a nationwide satellite and internet distribution system for more than 1,250 local NPR

Member and non-member stations across the country that is capable of receiving and transmitting the Presidential-level Emergency Alert System feed directly from the Federal Emergency Management Agency. Additionally, many public radio stations are connected to their state or county emergency agencies in order to transmit critical emergency messaging tailored to local communities. NPR/PRSS has been named as a resource in at least 20 states' emergency plans and, at the local level, stations often work with officials as the source of record for local emergencies. Further, given public radio's local news role, public radio stations have the capability to initiate live broadcasts surrounding automated alerts that provide local audiences with context to understand emergency situations, enhance their safety, and access assistance.

NPR is participating in this proceeding because we are concerned about the risks that artificial intelligence ("AI") poses for journalists and media organizations (collectively, "publishers"), including nonprofit public radio, and for the general public. These comments focus on concerns related to the rapid development of generative AI ("GAI"), which utilizes vast catalogs of content and data to train the AI system; surface a response to a user's query; and synthesize (summarize, explain, or analyze) source content in response to a user's request. GAI poses numerous threats, not all of which can be listed here. However, some of the most timely and direct concerns involve the use of existing content.

Among other threats, GAI might divert audiences by copying or repurposing content from existing content providers. Also, we know that developers exploit existing editorial content created and owned by others to develop GAI systems that inure substantial benefit to the developer only. A second group of risks arises from the potential falsity of GAI-produced

content, whether the developer intended the falsity or not.[2] For example, it has been demonstrated that GAI will "hallucinate" and produce "answers" or content that is not factually accurate. GAI can also be used by those who wish to be, at best, "creative" or, at worst, "deceptive" by enabling AI to impersonate and imitate individuals. These uses can harm public trust in media and produce misinformation at a massive, and convincing, scale.

With regard to using content from publishers, including nonprofit media organizations like NPR and public radio stations, AI developers should be discouraged from using journalistic content without permission or as otherwise allowed under copyright law and held accountable for harms caused by GAI, including liability for false or libelous statements, unfair trade practices, and harm to or interference with intellectual property or publicity rights. Laws and regulations governing AI should (1) respect journalistic efforts and the rights creators have in their work, (2) ensure adequate compensation for the use of that work, (3) promote transparency about how data is used, and (4) guard against impersonation, imitation, false statements, and misinformation.

In many circumstances concerning GAI, the laws publishers need already exist, and it is critical that they continue to provide such protections against misuse by GAI systems. With regard to copyright law specifically, Congress should be careful not to make abrupt or confusing changes to well-developed law. To the extent that new laws are necessary, they should be narrowly tailored to the specific circumstances raised by the use of GAI.

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[2] *See, e.g.*, Matt O'Brien, *Chatbots Sometimes Make Things Up. Is AI's Hallucination Problem Fixable?*, AP (Aug. 1, 2023), https://apnews.com/article/artificial-intelligence-hallucination-chatbots-chatgpt-falsehoods-ac4672c5b06e6f91050aa46ee731bcf4

II.   Responding to NOI Questions

a. General – Questions 1, 2, & 5

GAI utilizes vast catalogs of content and data to train the AI system; to surface a response to a user's query; and to synthesize (summarize, explain, or analyze) source content in response to a user's request. Existing laws cover most GAI uses, but for some uses applicability is ambiguous. This, in turn, imposes significant threats to publishers and the public, discussed further here:

Content – Publishers invest significant time, money, and expertise in gathering news and developing content. The dedication and skill with which NPR and local public radio station journalists and editorial staff gather, write, photograph, edit, and produce is central to the reliability, accuracy, and newsworthiness of public radio, and furthers public trust in the information public radio provides. AI developers must respect creators' rights to that content, must not use content without permission or as copyright law otherwise allows, and must not divert audiences by copying or repurposing that content for their own benefit. That applies to all types of publisher creations—whether written news, radio broadcasts, podcasts, photography, audiovisual programs, music, or other protected works.

Compensation – Publishers are entitled to negotiate for and receive fair compensation for the use of their content to account for the business harms GAI can impose by using publishers' content to produce a competitive product. A patchwork of federal and state laws may provide some of the protections that publishers need in light of the current status of GAI, but it is not clear that GAI developers actually make an effort to comply with those laws or negotiate for the use of content. Existing copyright law could be used to make clear that GAI developers must fairly negotiate with a publisher to use the publisher's content. Other laws, particularly states'

laws on the right of publicity, prohibit the use of someone's likeness for commercial purposes without their permission, subject, of course, to basic First Amendment principles. However, many GAI uses are not the kinds of newsworthy or editorial uses that would be, nor should be, protected by the First Amendment. Compensation from GAI developers must be fair—accounting for the costs to the publisher or individuals and the value to the AI developer, as well as the protentional harms a GAI system may impose on publishers, individuals, and the public.

Data – Laws and regulations should impose high standards of transparency on GAI developers. Transparency should be to both the publishers (in service of respecting their content and enabling adequate compensation) and the public (to know when a response is not from a real person). Clear and prominent attribution of source content utilized by the AI system and links directing users to the source content could help mitigate certain harms associated with GAI. However, labeling requirements could actually harm a publisher, if they are listed as the source behind GAI that hallucinates. Therefore, GAI developers must take responsibility for false or libelous content delivered by their systems, being liable to both any person who is libeled by the GAI content as well as to the publisher whose reputation may be harmed by being associated with the system as a "source" (such claims would be akin to trademark dilution).

Misinformation – GAI systems pose numerous risks for publishers in terms of public trust, and, consistent with the First Amendment, developers should be held accountable for harms they cause. Whether text, images, or voice, AI should generally not be used to impersonate or imitate style or sound without permission. AI should not enable the spreading of misinformation, particularly when it is intentional (e.g., an AI-generated video or recording of a reporter or public official). In accordance with journalism ethics, AI can be used to inform journalism but should not create it.

To address some of these concerns, while also retaining the certainty of established copyright law, Congress should amend section 301 of title 17 to make clear that state unfair competition laws protecting "hot news" are not preempted by federal copyright law. Copyright law generally provides the proper balance of protections for rightsholders and permitted uses, the Copyright Act would benefit from a narrow amendment clarifying that 17 USC 301 does not preempt state misappropriation protections for time-sensitive news because such state laws do not provide a right equivalent to any of the exclusive rights within the general scope of copyright. Alternatively, Congress could add a section 123 to chapter 1 of 17 USC to provide a narrow protection for "hot news." This would resurrect the "hot news doctrine" that the Supreme Court identified in the 1918 case *International News Service v. Associated Press*,[3] and that the Second Circuit ruled had been largely preempted by the 1976 Copyright Act,[4] and, in doing so, would prevent GAI from scraping publisher websites for breaking news and then repackaging the content in new expressive form.

b. Training – Questions 8, 9, 10 & 13

Fair use is a four-part balancing test that combines fact and law, and the last two prongs are the most relevant—the amount used and degree to which the use harms the market value of the work. Whether a use is fair has to be decided on a case-by-case basis. GAI developers can easily cause significant harm to the market for news if they use our content without a license. Large media companies like NPR have Permissions departments that grant licenses for use of content and GAI developers can reach out to those whose content they wish to use to seek licenses. Licensing requirements may slow the development of GAI, or it may narrow the scope

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[3] 248 U.S. 215 (1918).
[4] *See* Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876 (2d Cir. 2011).

of what materials are used in the development of a GAI tool, but these impediments are not flaws. The indiscriminate proliferation of technology without adequate safeguards has proven to cause more harm than benefit, as we have already seen by the destruction of local media and the vast infiltration of misinformation.

c. Transparency & Record-Keeping – Question 15

NPR generally supports transparency and record-keeping requirements for GAI developers, but cautions that any requirements should not burden publishers or, worse, create new harms. GAI developers should be required to report out the source content they use for their GAI systems. This could be done in numerous ways, including reporting use to a government oversight agency or a collective rights organization. The CEO of Anthropic noted companies' ability to do this in the Senate Privacy Subcommittee hearing on July 25, 2023. (Because of the inherent inaccuracies and hallucinations in GAI systems, it is yet unclear whether it would harm publishers to further require GAI to tell users the source content drawn on for the GAI's response to a user query. If such transparency is required, then GAI developers should be accountable for harms caused to a publisher by a hallucination.) Additionally, Congress should require GAI developers to include a label, or where necessary more obvious markings, on all content developed by GAI. On the other hand, if "creators of training datasets" refer to content creators (e.g., publishers), creators should not be burdened with a potentially onerous and costly obligation just to protect their interest in works already protected by copyright law without such a requirement. As is standard in copyright law, the obligation should be on those making use of the content.

d. Additional -- Question 31

Congress ought to adopt a federal right of publicity or anti-impersonation law that prohibits using someone's name, image, likeness, or voice for commercial gain or with intent to deceive the audience to believe that false, faked, or AI-generated content is true or represents actual facts or event. Though state laws protecting the right of publicity can be helpful for preventing impersonation, these laws differ from state to state and generally require commercial exploitation as an element of the civil offense.[5] Intentional deception can be harmful regardless of commercialization; the FCC, for example, prohibits hoaxes and the intentional distortion of news in recognition of the harms caused by such activity.[6] Although false speech may receive some First Amendment protection under some circumstances, intentionally false speech is not protected by the First Amendment when there are precise, articulable harms, such as in the case of fraud or libel.[7] Thus, Congress should adopt a narrow law that creates liability in instances where someone's name, image, likeness, or voice is used with intent to deceive the audience to believe that false, faked, or AI-generated content is true or represents actual facts or event. Content that is clearly marked as fictional or is clearly fictional in context, such as in expressive films, would not be penalized by such a law. However, to the extent GAI would be used to intentionally deceive people into believing false things as if they were fact, that is a compelling government interest, and there is no other, more narrow way to avoid that harm than to prohibit it. Liability would turn on intentional deceptiveness—that something is fake but is trying to

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[5] *See, e.g.*, 765 Ill. Compiled Statutes 1075; Cal. Civ. Code § 3344.

[6] *See* 47 C.F.R. § 73.1217 (prohibiting a broadcast license from broadcasting false information concerning a crime or a catastrophe if: the licensee knows this information is false; it is foreseeable that broadcast of the information will cause substantial public harm; and broadcast of the information does in fact directly cause substantial public harm); *see also* FCC, Broadcast News Distortion, https://www.fcc.gov/broadcast-news-distortion.

[7] *See, e.g.*, U.S. v. Alvarez, 567 U.S. 709 (2012).

persuade someone otherwise. Moreover, criminal penalties may be necessary. This could be achieved through a federal right of publicity, although we realize that the merits of any particular proposed language may be subject to debate and may have additional arguments for and against it. Creating a new "anti-impersonation law" may be necessary to protect individuals from others using AI to impersonate their art, voice, image, or likeness in such contexts.

III.   Conclusion

Copyright law must continue to respect publishers' rights in their works. For the reasons stated above, NPR and its Member stations ask the Copyright Office to recognize that copyright law must be applied and interpreted to protect these interests – and that, unless otherwise authorized by copyright law, AI developers must obtain permission to use publishers' content, and that permission should be negotiated and fairly compensated.

Existing laws provide a valuable patchwork of protections for publishers, and any legislative activity should respect free speech rights under the First Amendment and not upend established law, particularly in the areas of copyright law and state protections and defenses under the right of publicity and against unfair competition. Within that framework, we ask the Copyright Office to recommend that:

1. Congress amend section 301 of title 17 to make clear that state unfair competition laws protecting "hot news" are not preempted by federal copyright law.
2. GAI developers and users be required to label AI-generated works as such, and that GAI developers report to a government agency or a collective rights organization the source of the content they use for their systems. They must also take responsibility for false or libelous statements made by their GAI systems.

3. With right of publicity, which differs across the states and includes commercial exploitation as an element, Congress should pass a federal right of publicity or anti-impersonation law that prohibits using someone's name, image, likeness, or voice for commercial gain or with intent to deceive the audience to believe that false, faked, or AI-generated content is true or represents actual facts or event. Moreover, criminal penalties may be necessary.

Respectfully submitted,

NATIONAL PUBLIC RADIO, INC.

_____/s/_____

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