



Comments of the Professional Photographers of America on Artificial Intelligence and Copyright

U.S. Copyright Office
Docket# 2023-6
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PPA is the world's largest nonprofit photography association organized for professional photographers, by professional photographers, with almost 35,000 members. Its members are a microcosm of photography itself contributing to the social and economic well-being of every community in America. As an industry, photography is among the nation's most diverse – its face and economic make-up mirroring that of our people. Since its beginnings on a Paris street corner in 1839, photography has been the keeper of our societal memory, its bright light illuminating both success and suffering – human achievement and social injustice. Photography is the protector and what is real in our world. In that way, the photographic industry deserves its place front and center in the discussion of AI and copyright.

PPA applauds the U.S. Copyright Office for its desire to create a more well-rounded understanding of the affects of AI as it pertains to copyright and the industries it serves. We appreciate this opportunity to provide our views on the vitally important matter of artificial intelligence (AI), specifically generative AI, and copyright law and the rights of creators. The Copyright Office's Notice of Inquiry begins by appropriately asking about the benefits and risks of AI technology.

Question 1: Benefits and Risks

AI technology presents the opportunity for almost infinitely beneficial tools for creators to access in ways we cannot yet imagine. Professional photographers are already using AI tools to streamline their work. As a start, it offers the opportunity to speed the photographic retouching

process, and allows for the automation of many business functions. While these may seem to be modest gains, anything that gives time back to already over-worked professional photographers opens the path to better and more personal interactions with their consumer – an obvious win for small creators working in an industry built almost entirely on relationships.

Unfortunately, the risks that AI presents to the professional photographic industry are equally pronounced. By the nature of the business, photographers must advertise the quality of their work on their websites, and those websites must be easily found by prospective customers. Given that AI companies have operated under the presumption that everything on the internet is theirs for the taking, merely advertising one's work exposes photographers to the scraping of their best, most profitable works.

In addition to the inherent wrong associated with the initial scraping, the licensing market for stock photography and secondary uses of photographs will be substantially affected. Many photographers do not create a photograph just for a single client; over time they build a portfolio which has significant commercial value. From that portfolio they are able to generate income from prints and other reproductions and derivative works. But once these images have been scraped and can be generated by AI systems, those markets will be swallowed by unfair competition. In this example, photographers are no longer competing with other creators in an already hyper-competitive market, but are now forced to compete against their own works, scraped without permission, consultation, or compensation. Claims by the generative AI industry that the new works created may not actually reflect the original creators' works, and therefore will not compete with the original creator, are meaningless. The fact remains that photographers are being forced to compete with an entity that only exists because it has been allowed to scrape their works. Scraping photographers' works is not a just a single blow to their livelihood – it is the first blow of a potentially devastating one-two punch.

Question 2: Unique Issues

In terms of the risks associated with outputs of AI systems, photographers with different specialties will be affected differently. For example, portrait photography is less likely to be substantially harmed; people don't put images of AI-generated children on their walls. By contrast, nature and wildlife photographers are likely to be among the most harmed. They will no longer fly to a distant location and camp in the wilderness for weeks because the opportunity to recover those costs, much less make a profit, will dry up as the result of AI flooding the market with "fake nature." Likewise, commercial/advertising photography and similar fields will have a difficult time competing moving forward. Instead, AI systems can almost instantaneously provide an artificial image that is neither real nor necessarily true to life. Again, it is important to note that they are only able to do this because of unauthorized scraping that provided points of reference for the computer to copy. With the exception of those who value authenticity, that cheap and easy substitute will be enough. The result is that our society will be poorer. Our knowledge, understanding, and view of our natural world will diminish as creators are no longer incented to create. As a result, each of us will lose color and richness in life as awe-inspiring photographic works become shrouded by doubt and skepticism. Our wonder for the world will be replaced with the wonder for whether anything we see is real or just more AI. In this almost certain eventuality, all of humanity loses.

To the extent that AI systems generate images that are substantially similar to the creative work of photographers, there must be accountability.¹ They cannot be allowed to steal photographers' work and then compete with those photographers using that same work.

In order to produce images and other output that have commercial appeal, AI technology requires inputs that provide reference points to human expression. NOTHING about the technology requires those inputs to be obtained surreptitiously, without permission or

¹ We understand there are questions in such circumstances as to who is the direct infringer and who is liable under doctrines of secondary liability. Whatever the analysis, the outcome must be liability that compensates the creator for the infringing use of their work(s).

payment. It is not the technology to which we object, even though we can easily foresee the decimation of untold numbers of jobs, including substantial sectors of professional photography. Rather, our objection is to the manner in which much of the generative AI industry has unjustly enriched itself at the expense of creators. There are exceptions – Adobe, while also under scrutiny, is endeavoring to build a commercial generative AI system in a way that is ethical and respectful of creators’ rights. By contrast, much of the dark world of generative AI is built on the idea that the scale of the theft would be too large, and consumers too enamored, for anyone to do anything about it. We believe this to be a miscalculation of human nature, not to mention the will of the U.S. Copyright Office to defend creators’ rights. The technology is a neutral tool; the conduct behind it is not.

Every business requires input which is part of the cost of the enterprise. Photographers must purchase and maintain expensive equipment, sophisticated software, and pay for web hosting, security, and management. Likewise, construction companies pay for the lumber, metal, wiring, pipes, concrete, and all the other materials and labor needed to build a new home. It is fundamental that humans need shelter for survival. Owning one’s own home is a basic part of the American dream. Nonetheless, homebuilders still have to pay for the materials needed to build a house. Some will respond to this Notice of Inquiry with the view that the perceived importance of AI is so great that it justifies the trampling of creators’ rights. Of course, such a notion is wrong from both a legal and a moral perspective and it is imperative the Copyright Office say so unambiguously.

Internet companies pay incredible sums for computer hardware, energy-intensive data centers, and salaries for the developers who build and maintain their secret algorithms. No one suggests any of that should be given to them for free. Why then are copyrighted works the one thing many of them simply take without paying? Because they can.

Many generative AI companies made a decision to take first and ask forgiveness later. Or, more accurately, take first and litigate later. Perhaps they didn’t ask because they knew what the

answer would be. A few would say “yes.” The rest would either refuse or request compensation. The fact that they didn’t explore those options with creators is an indictment of those generative AI companies. It wasn’t convenient. It would have been costly. It wouldn’t scale. So they just took it.

In the time between their decision to take others’ copyrighted works and the time that fact came to light, those AI companies had the opportunity to construct legal defenses. Even if those defenses are without merit, the practical inability of a photographer with \$38,000 in annual income to reach a determination on the merits of a case in federal court is obvious.

Scraping is theft, plain and simple. In the context of copyright, there are nuances and exceptions that will be litigated. But we should not lose sight of the forest for the trees. The facts are straightforward and uncontested. AI companies freely admit they need massive volumes of human-created works, which necessarily includes copyrighted works, to make their systems functional and marketable.² Those companies are now worth tens of *billions* of dollars – OpenAI has publicly stated its valuation at \$90 billion.³ Again, by their own admission, generative AI systems would not work if they didn’t take our members’ works. There is no credible view but that this constitutes a blatant taking of value and transfer of wealth. Moreover, the AI industry has admitted to the crime with no apology other than the often-stated position that its own importance makes it exempt from copyright law. If the Copyright Act is held not to prohibit such outrageous behavior, it is failing its Constitutional role.

² “Written Testimony fo Sam Altman, Chief Executive Officer, OpenAI,” available at <https://www.judiciary.senate.gov/imo/media/doc/2023-05-16%20-%20Bio%20&%20Testimony%20-%20Altman.pdf>

³ <https://www.wsj.com/tech/ai/openai-seeks-new-valuation-of-up-to-90-billion-in-sale-of-existing-shares-ed6229e0>

Question 3: Collective Licensing

Some advocate a collective licensing scheme to provide some form of compensation to creators for the use of their works to build AI systems. PPA could not disagree more. At every level of the analysis, collective licensing is inappropriate, especially at this stage.

The most basic building blocks of a successful collective licensing system are trust, transparency, and accountability. In the context of AI scraping, none of those exist.

Trust

A collective licensing system must be based on trust and mutual interest. That element exists in all successful collective systems. The creation of a collective licensing system should be an arms-length arrangement reached in mutual good faith, respectful of each participant's interests and rights.

As discussed above, most of the AI companies have acted in a manner at odds with any notion of trust. The free market that exists for licensing photographs (and other works) was undercut by AI companies' disregard for law, ethics, and equity. Instead, many companies made a business decision to engage in unauthorized, secret scraping. This is the online equivalent of mass looting. But instead of coming on the heels of a natural disaster or other calamity, the looting/scraping IS the calamity. And by all reports it continues unabated. Nothing about those AI companies' conduct is respectful or trustworthy, and negotiating an after-the-theft 'deal' is hardly arms-length.

Transparency

Transparency is an integral part of any responsible collective management system.⁴ Both the collective management organization and the subscribing creators must be able to ascertain

⁴ See, e.g., "There seems to be universal agreement among industry participants that accurate, comprehensive, and accessible licensing information, as well as transparent usage and payment data, are essential to a better

which works are being used, when, in what manner, and in what volume. But this is not available in regard to much of the generative AI industry. Without transparency, those AI companies remain a proverbial “black box” with no path for evaluating the accuracy of their representations about the usage of copyrighted works. It is ironic, if not hypocritical, that many AI companies use terminology about “open” internet and even “OpenAI.” For when it comes to their business operations, they are closed tight.

Accountability

In the context of a functioning collective licensing system, if companies take copyrighted works without reporting usage (and therefore underpay royalties), fail to report usage of works, or use works beyond the scope of the collective license, then they are subject to remedies. Those remedies may include the full scope of damages for copyright infringement under the statute. Of course, this is a critical incentive for the user companies to report their use accurately and fully, and to act within the limitations of the license.

By contrast, much of the generative AI industry denies liability and is actively fighting assertions of infringement in court. This ongoing hostility towards accountability and respect for creators’ rights is fundamentally at odds with a successful collective licensing system. And should the AI companies win in court, any collective licensing system would collapse instantly. Only when AI companies accept responsibility for their actions can there be any hope of working towards a suitable arrangement.

For all these reasons, any discussion of collective management is premature. Before there can be any consideration of such a system, more AI companies must decide to act responsibly and fairly with regard to creators and must provide the elements outlined above.

functioning music licensing system.” U.S. Copyright Office, “Copyright and the Music Marketplace,” (Feb. 2015) at 183.

Even if the mindset of AI companies were to change, there will remain the crucial question about the amount creators receive in royalties for the use of their works to build AI systems. Given the scope of works taken by those AI systems, both in volume and in kind, valuation will be extremely complicated. For instance, how does one set a fair rate for the use of one photo versus one hundred versus one thousand; is it a simple multiplier or is there a greater incremental value to a larger collection?

A major part of this discussion must include the fact that different types of works are valued differently and the works of different creators are valued differently. Professional photography is not based on the sale of a commodity (photographs), but rather, on the skill, reputation, and brand strength of the photographer. Any attempt at collective licensing would inherently discount the workings of the free-market and destabilize the entire photographic industry – dumbing it down to the lowest common denominator.

The informal discussions PPA has heard are not encouraging. They amount to trading a Constitutional right for pennies. Such an arrangement would so deprive photographers of the ability to earn an income that it would turn all photography into a hobby. PPA does not believe it, or any other entity, has the right to agree to a system that would attack the underpinnings of the photographic market, leading to the eventual death of professional photography. Great photographers don't just create images, they create a new style, a persona, a brand. Without the ability to set their market price those creators would no longer be able to maintain a viable business. The net result is that the public loses the skilled creators who enrich our lives. We argue that no entity has the right to step between creators and their customers.

Likewise, we reject the argument that collective management is the best or only resolution to a bad situation. Much of the discussion surrounding AI is attempting to solve an unknown problem. We don't know what can be done because no one has turned to the generative AI industry to demand accountability or transparency. How can some have decided what the best solution is when we don't know either the specifics of how works are being used or what

options there are for redress? Only after generative AI companies are forced to be transparent can we create a solution, which could include the possibility of disgorging works from AI systems. The AI industry dismisses this with a wave of its hand, but given its conduct to date, invasive action on the part of the U.S. Copyright Office and Congress seems more than appropriate. Until then, the discussion about collective licensing would be pre-mature at best. This is simply not the time.

At this point, a collective licensing scheme would lock-in the unjust gains of the AI industry, making a bad situation worse. While some who see themselves administering such a license may see a business opportunity, it would come at the further expense of the creators they are supposed to represent. We do not believe working creators whose livelihoods depend on a healthy free market would condone such an approach.

Question 4: International Considerations

PPA was heartened to see that the leaders of the G7 explicitly recognized the need for generative AI systems to respect “human rights” and specifically to “safeguard intellectual property rights including copyrights, promotion of transparency...and responsible utilization of these technologies.”⁵

A variety of jurisdictions around the world have enacted or are considering enacting specific legal provisions governing AI systems. Our observations here are by no means comprehensive of all the proposals around the world, but we note several elements that have arisen.

In the European Union, there is consideration of a requirement for generative AI companies to disclose information about their use of copyrighted works. The particulars are still in flux but

⁵ G7 Hiroshima Leaders’ Communique at para 38. Available at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/20/g7-hiroshima-leaders-communique/#:~:text=We%2C%20the%20Leaders%20of%20the%20Group%20of%20Seven,of%20the%20United%20Nations%20%28UN%29%20and%20international%20partnership.>

this would be a welcome development. In China, we understand that there are regulations requiring generative AI systems to “respect intellectual property rights.” This is welcome, if a bit abstract. We hope that it will be strictly applied.

Unfortunately, some jurisdictions appear to have succumbed to the siren song of promoting AI at the expense of others. We understand that a memorandum of the Ministry of Justice in Israel has stated that AI companies may scrape copyrighted works within the scope of Israel’s fair use provision. A similar pronouncement was issued by a minister of the government of Japan. This was particularly disappointing as it appears to contradict other principles articulated by the government of Japan that the basic philosophy should be “respect for human dignity” and a “human-centric” AI policy.⁶ Also in the United Kingdom, an overly broad exception to copyright that would have allowed AI companies to scrape copyrighted works was being considered but now appears to have been abandoned. PPA considers any exception that broadly allows scraping of copyrighted works without the authorization of the copyright owner to violate all three steps of the three-step test that governs permissible exceptions to copyright in international instruments.

Question 5: Is Legislation Needed?

Is legislation needed to address issues with generative AI? The answer is a resounding, “Yes!”

As discussed above, whatever the nuances of copyright jurisprudence, if the value from copyrighted works can be taken to build companies worth tens of billions of dollars, even in their infancy, then the creators of those works deserve compensation. AI companies should not be allowed to insulate themselves from accountability by leveraging their massive cash advantage, earned while standing on the backs of the creators whose rights they violated.

⁶ Social Principles of Human-Centric AI (2019) available at <https://www.cas.go.jp/jp/seisaku/jinkouchinou/pdf/humancentricai.pdf>.

In order to reaffirm these basic principles of fairness, the rights of creators must be unambiguously reaffirmed. The law should be explicit that AI companies may only ingest works with the permission of the copyright owner and compensation for their work.

In addition, the law should require transparency. AI companies should be required to disclose how, when, and where ingested works have been used. This is a fundamental building block for trust, transparency, and accountability.

Conclusion

PPA members embrace the benefit of AI tools, both in support of their creative work and to streamline their business operations. At the same time they are clear-eyed about the sobering consequences of this technology. Substantial segments of the field of professional photography will likely not be able to compete with the cheap and quick availability of AI-generated images. For example, images that purport to represent nature and the world around us will be little more than computer-generated fiction, deceiving the public and calling into question everything we see. In that example, we will all be the poorer. Our society will have to adjust to both widespread disruption in the job market and to fundamental questions of what is real and what is fake. Even foreseeing all this, we do not oppose the many potentially positive uses for AI in the creative industries.

What PPA opposes in the strongest terms is the unethical, unfair, and illegal conduct of many AI companies. The unauthorized secret scraping of our members' works for commercial advantage must not be excused or overlooked – they cannot be deemed unfortunate early casualties that will soon be forgotten. These AI companies have stolen hundreds of thousands of creators' works. They admit they could not have built their systems without those works – essentially a de facto admission of culpability. PPA implores the Copyright Office to take a clear, strong, and unambiguous stance against this conduct.

For if the agency that administers our copyright system doesn't take a stand against it... who will?