In the Matter of Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation	**Docket No. PTO-C-2019-0038** **Submitted January 10, 2020**

I. PRELIMINARY COMMENTS

The Motion Picture Association, Inc. ("MPA") is pleased to provide these comments in response to the Patent and Trademark Office's Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation (Docket No. PTO-C-2019-0038), 84 Fed. Reg. 58,141 (Oct. 30, 2019) (the "Request").

The MPA is a not-for-profit association founded in 1922 to address issues of concern to the motion picture industry. The MPA's member companies are: Walt Disney Studios Motion Pictures, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, and Warner Bros. Entertainment Inc. The MPA's members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets.

The MPA's members have long supported and invested in innovation, including by fostering the development of new proprietary technologies and by licensing the right to use cutting-edge technologies developed by third parties. In the process of producing movies and television shows, the MPA's members or their affiliates develop and use a vast array of technological innovations—including innovations that may be categorized under the broad

umbrella of artificial intelligence ("AI")—to help creators bring their artistic visions to life on-screen.

Such advanced technologies include those that bring photorealistic images or other visual effects to the finished audiovisual work; assist artists and animators in the elaborate process of developing computer-generated special effects; safeguard actors and stunt doubles from the risk of harm while shooting scenes; streamline the filming and editing processes; and many more. On the distribution side, advanced technologies allow the MPA's members to reach more consumers through more diverse channels than would have been imaginable a generation ago. In short, technological innovation has been and will continue to be of central importance to the motion picture industry and to the ability of the thousands of people involved in creating motion pictures to bring those works to widespread and diverse public audiences.

The MPA's members' use of technology exists against the backdrop of a stable legal regime governing the rights and responsibilities of those who create and use copyrighted works. The copyright system functions well and has successfully accommodated decades of technological change. The MPA's members believe that, based on what is now known about the state of AI technology, it is appropriate for courts to continue to apply existing copyright principles to address the legal issues that presently appear likely to arise in connection with the use of technologies labeled "AI."

II. THE STATE OF ARTIFICIAL INTELLIGENCE TECHNOLOGY, AND THE NEED FOR RESTRAINT IN CONSIDERING CHANGES TO COPYRIGHT LAW

The term AI lacks a precise definition. As one commentator put it, "[d]efining AI systems is not an easy task. There are as many definitions as there are types of AI systems."[1] Until recently, systems labeled as "AI" "mostly acted in ways predetermined by their human-created programming."[2] Today, some AI systems are capable of mimicking what is thought of as "human learning," although programming decisions made by humans still circumscribe the systems' output.[3] While AI has developed rapidly in recent decades, the technology remains in its infancy, and much is unknown about how it will evolve.

Because AI may develop in unforeseen directions over time, restraint is warranted when considering whether established copyright doctrine appropriately addresses the various issues presented by AI and whether changes to the law are necessary.

Lawmakers have always had to confront the potential impact of technological change on copyright and other areas of the law. "Since the birth of copyright, every age has seen the emergence of a new medium of expression or technology that has led people to express the fear and concern that it defied the boundaries of existing doctrines or that the new candidate for protection was so strikingly different that it required separate legal treatment."[4] In general, lawmakers and scholars have recognized the importance of hewing to time-honored legal

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[1] S. Yanisky-Ravid, *Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A Era—the Human-Like Authors Are Already Here—A New Model*, 2017 Mich. St. L. Rev. 659, 73.

[2] *Id.* at 674.

[3] *See id.* at 675.

[4] A.R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 Harv. L. Rev. 977, 982 (1993).

principles rather than making significant changes to legal doctrines that have well served the interests of creators and consumers alike.[5]

In 1965, for example, when Congress was considering whether and how to adapt copyright law to the proliferation of computer technology, the Register of Copyrights presciently advised Congress to act with restraint. The Register explained that, when contemplating changes to copyright law, lawmakers must ensure that the law continues to "provid[e] the necessary monetary incentive to write, produce, publish, and disseminate creative works, while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should because of copyright restrictions"—all while "try[ing] to foresee and take account of changes in the forms of use and the relative importance of the competing interests in the years to come."[6] The Register noted that a "real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances."[7] The Register urged Congress to enact legislation "adopt[ing] a general approach" that could survive unforeseen developments.[8] Congress followed this approach with the 1976 Copyright Act, which generally sets forth copyright rules of broad applicability rather than sui generis prescriptions crafted for specific technological developments.[9]

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[5] *See id.* at 1053-54 (noting that "the copyright system has proven malleable enough to absorb each new medium of expression").

[6] Copyright Office Gen. Revision Steering Comm., Library of Cong., 89th Cong., *Supplementary Register's Rep. on the General Revision of the U.S. Copyright Law* § 13 (Comm. Print 1965).

[7] *Id.*

[8] *Id.*

[9] *See* Miller, *supra* note 4, at 1054 ("When the United States revised its Copyright Act in 1976, it recognized that forms of expression would continue to evolve; thus, the new statute was drafted with commensurate flexibility.").

Similarly, in the late 1970s, the National Commission on New Technological Uses of Copyrighted Works ("CONTU") advised that because *sui generis* rules based on existing technology could quickly become obsolete, the application of copyright law to new technologies was better accomplished "on a case-by-case basis by the institution designed to make fine distinctions—the federal judiciary."[10]

The MPA urges the Patent and Trademark Office to follow the same measured approach with respect to potential developments in AI. The Patent and Trademark Office should reaffirm core copyright principles, which have balanced the rights and responsibilities of copyright owners and users through decades of technological change. The MPA focuses its comments in three particular areas: (1) the rules governing copyright authorship and ownership; (2) the allocation of liability for copyright infringement; and (3) the affirmative defense of fair use.

III. MPA'S RESPONSES TO SPECIFIC QUESTIONS

A. Copyright Authorship and Ownership Rules (Responding to Questions 1 and 2)

Two questions in the Request deal with issues of authorship and ownership of works produced with the use of AI systems. The MPA's members respect the importance of ensuring that works of original expression receive copyright recognition and protection. Questions of copyright ownership, however, also affect the rights of assignees, licensees, and others who utilize works generated with the use of AI in creating their own works of original expression. Whatever recommendations emerge regarding the authorship and ownership of works created

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[10] Nat'l Comm'n on New Tech. Uses of Copyrighted Works, *Final Report of the National Commission on New Technological Uses of Copyrighted Works* 22-23 (1979); *see* Miller, *supra* note 4, at 981 (explaining that CONTU concluded that "copyright principles are flexible enough that is not necessary to fabricate an entirely different legal regime, sometimes referred to as sui generis protection," for regulating computer-generated works).

with the use of AI, a key goal must be to ensure clarity of ownership, so that prospective

assignees, licensees, or users can be confident that they have obtained all of the rights necessary

for their intended use.

Systems labeled as AI generally include the inputs of many human beings and/or

business entities.[11] Some are responsible for programming the AI system, while others supply

data, "train" the system, or provide it with feedback; still others own or operate the system to

produce a particular work.[12] And, multiple vendors employing different AI systems may play a

role in creating a single work.

The complexity of AI ecosystems creates the potential for multiple different individuals

or entities to claim an ownership interest in some or all of the rights in a single work produced

through the use of AI technology. As with other works that have multiple ownership interests, it

is important to the creative industries that utilize and incorporate such works in their own

original creative works that clear rules apply to the assignment and licensing of those works.

The challenge of delineating clear rules for assignment and licensing where multiple

ownership interests are at stake is neither unique to AI nor new to copyright.[13] Copyright

doctrine has several existing mechanisms for providing certainty to users of copyrighted works

in similar situations. For example, the law regarding works made for hire delineates the

circumstances in which employers or contracting parties will be deemed to be "the author [of the

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[11] *See generally* M.E. Kaminski, *Authorship, Disrupted: AI Authors in Copyright and First Amendment Law*, 51 U.C. Davis L. Rev. 589, 597 (2017) (listing contributors to AI systems).

[12] *See* Yanisky-Ravid, *Generating Rembrandt*, *supra* note 1, at 692; *see also* Miller, *supra* note 4, at 1056-58.

[13] *See, e.g.*, *id.* at 1059 (describing the complex authorship of sound recordings).

created work] for purposes of copyright ownership."[14] In the licensing context, the co-owners of a copyrighted work each have the authority to issue non-exclusive licenses for use of the copyrighted work, subject only to a duty to account to his or her co-owners.[15] That rule allows someone who has validly licensed the non-exclusive right to use a work from a co-owner to proceed with the creation of his or her own work without the threat of an infringement claim by other co-owners of the underlying work.

The MPA's members, like many other copyright creators, frequently acquire or license works created by third parties in the course of creating their own copyrighted motion pictures. Screenplays, music, music, photographs and other works of visual art, and special effects are just a few examples the areas in which content creators acquire or license the rights to use works created by other parties. Copyright creators rely on clear rules regarding the ownership, assignment, and licensing of such incorporated works to ensure that their own creations will not give rise to claims of copyright infringement. However ownership principles develop for works produced with the use of AI technology, it is important that the rules regarding assignment and licensing remain clear for those who lawfully acquire the rights to incorporate such material into their own creative content.

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[14] *See Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 137 (2d Cir. 2013) (internal quotation marks omitted).

[15] *See, e.g.*, *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007) ("A co-owner may grant a non-exclusive license to use the work unilaterally, because his co-owners may also use the work or grant similar licenses to other users and because the non-exclusive license presumptively does not diminish the value of the copyright to the co-owners." (emphasis omitted)); *Siegel v. Warner Bros. Entm't Inc.*, 581 F. Supp. 2d 1067, 1070 (C.D. Cal. 2008) (explaining that the "authors of a joint work are co-owners of the copyright" and have the "duty to account to other co-owners for any profits" (internal quotation marks omitted)).

B. Allocating Liability for Copyright Infringement (Responding to Question 4)

The Request also asks whether current laws for assigning liability for copyright infringement are adequate to address a situation in which an AI process creates a work that infringes another copyrighted work. The MPA's members understand this question to ask whether current doctrines for assigning liability in such circumstances should be changed as the result of the involvement of AI in the process.

Existing liability doctrines establish a general, well-accepted framework for analyzing claims of direct and secondary copyright infringement in the context of new technologies. Based on what is now known about AI technology, the existing doctrines of direct and secondary liability—when applied consistently with their purpose of holding actors responsible for infringing acts they commit or cause others to commit—appear adequate to provide a clear and workable baseline for allocating liability in the AI context.

The "fundamental . . . principles" of copyright liability "are clear."[16] One may be directly liable for infringement by "violat[ing] any of the exclusive rights of the copyright owner."[17] In addition, as the Supreme Court has explained, "doctrines of secondary liability . . . are well established in the law."[18] One may infringe contributorily by "ha[ving] knowledge of another's infringement and . . . either (a) materially contribut[ing] to or (b) induc[ing] that infringement,"[19]

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[16] *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 117 (2d Cir. 2010).

[17] 17 U.S.C. § 501(a).

[18] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). Indeed, the Supreme Court, citing "principles recognized in every part of the law," first held that secondary liability doctrines apply in copyright law over a century ago. *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911).

[19] *Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 831 (9th Cir. 2019).

or infringe "vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."[20]

Courts have applied these liability doctrines across a wide range of technologies. For example, the Second Circuit held that a self-described news-monitoring service ("TVEyes") that redistributed copyrighted content to its customers directly infringed the content owners' exclusive rights under copyright.[21]

Based on what is now known about AI, there does not appear to be any immediate need to change the foregoing rules to deal with AI systems. It is particularly important that a party's use of AI technology should not become a pass from the liability rules simply because an AI system is involved. The designers, owners, and operators of AI systems that commit infringing acts may be subject to liability for directly infringing copyright, depending on the actions of individuals involved and how the systems exercise the copyright owner's exclusive rights.[22] The same individuals and entities may also be subject to secondary liability when others use their systems to directly infringe copyright.[23] Based on what is currently known regarding AI, there is no reason to believe that these existing liability doctrines will be inadequate to deal appropriately with new scenarios engendered by the use of AI technology. The MPA's members believe there is no immediate need for changes to the law governing the assignment of direct and secondary copyright liability in the context of AI technology.

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[20] *Grokster*, 545 U.S. at 930.

[21] *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 181 (2d Cir.), *cert. denied*, 139 S.Ct. (2018).

[22] 17 U.S.C. § 106

[23] *See Grokster*, 545 U.S. at 930.

C.   Fair Use Defense for Ingesting Large Volumes of Copyrighted Material in the Use of AI Systems (Responding to Question 3)

The Request also seeks feedback on whether the affirmative defense of fair use, as it stands today, adequately addresses the legality of AI systems that ingest large volumes of copyrighted material for training purposes or to produce output. Current doctrine requires a fact-specific, case-by-case analysis to determine whether fair use has been made of a copyrighted work. In the MPA's view, the existing fair use factors, when properly applied, appear to be capable of dealing with assertions of the fair use defense that may arise in the AI context.

The fair use defense, which originated in the common law, is a "privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent."[24] As codified by statute, the defense requires "a case-by-case determination whether a particular use is fair," based on "four nonexclusive factors"[25]: (1) "the purpose and character of the use"; (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."[26]

The Supreme Court has emphasized that the four statutory factors are to be "weighed together, in light of the purposes of copyright," and that the "task is not to be simplified with bright-line rules."[27] Accordingly, the fair use defense requires that courts take a "subtle,

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[24] *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985); *see Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575-76 (1994) (discussing common-law origins of fair use).

[25] *Harper & Row*, 471 U.S. at 549.

[26] 17 U.S.C. § 107

[27] *Campbell*, 510 U.S. at 577-78.

sophisticated approach" to each case, rather than establishing broad, categorical rules.[28] For that

reason, the fair use defense has remained remarkably stable over the decades, even as courts

apply the fair use factors to a host of new technologies.

For example, while courts in some cases have found the mass digitization of books to

qualify for the fair use defense, those courts have noted that such uses "test[ ] the boundaries of

fair use."[29] The courts have avoided making categorical decisions that could have the effect of

"foreclosing a future claim based on circumstances not now predictable, and based on a different

record."[30]

The *TVEyes* case demonstrates that courts are capable of parsing the specific facts in

different cases and reaching different conclusions while applying the same law.[31] In that case, the

Second Circuit held that the service's unlicensed exercise of the owner's exclusive rights was

infringement that the fair use defense did not excuse.[32] The service argued that its use of the

copyrighted works was similar to prior mass digitization projects that had been found to

constitute fair use.[33] Based on the facts of the case, the Second Circuit appropriately

distinguished TVEyes from the previous book-scanning projects and concluded that the service's

exercise of the owner's exclusive rights did *not* satisfy the requirements of the fair use defense.[34]

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[28] *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 921 (2d Cir. 1994).

[29] *Authors Guild v. Google, Inc.*, 804 F.3d 202, 206 (2d Cir. 2015).

[30] *Authors Guild v. HathiTrust*, 755 F.3d 87, 101 (2d Cir. 2014).

[31] *TVEyes, Inc.*, 883 F.3d at 173.

[32] *See id.* at 174.

[33] *See id.* (explaining that the "appeal shares features with our decision in" the *Google Books* litigation).

[34] *See id.*

Importantly, the existing fair use factors are designed to account for new markets created by emerging technologies. The fourth fair use factor asks courts to evaluate "the effect of the use upon the *potential* market for . . . the copyrighted work."[35] That includes not only existing markets, but also markets that are reasonably likely to develop as a result of new technology, which may include markets for licenses to use large quantities of copyrighted materials as AI training data.

As these examples make clear, the federal courts understand that the fair use factors must be applied in a sensitive, case-by-case fashion to unforeseen scenarios involving new technologies. The MPA's members believe that, based on what is now known about AI technology and its potential use of copyrighted works, the fair use defense is sufficiently robust to determine which uses are fair and which are not.

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The MPA appreciates this opportunity to provide its views in response to the Request. The MPA looks forward to providing further input and working with the Patent and Trademark Office as it continues its consideration of these important issues.

Respectfully submitted,

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[35] 17 U.S.C. § 107 (emphasis added).