



## POSITION PAPER

---

### Artificial Intelligence

The Copyright Alliance supports the responsible development of artificial intelligence (AI) technologies and a thriving and robust AI economy. The continuing development of AI systems represents a profound achievement of the digital age that brings with it tremendous opportunities. In fact, many in the creative industry are already using or plan to use AI for the creation of a wide range of works that benefit society. But as with many advances in technology, these new opportunities come with challenges.<sup>1</sup>

Advancements in AI have led to a new frontier in generative technologies, and thus they are often accompanied by difficult legal questions surrounding both the ingestion of copyrighted works into AI systems and the output. As AI technology continues to evolve and questions arise about how copyright laws apply to the development and use of generative AI models, it's critical that the underlying goals and purposes of our copyright system are upheld and that the rights of creators and copyright owners are respected.

When examining the intersection of AI and copyright, the following general principles must form the basis of a common understanding amongst stakeholders, courts, policymakers, and the public.

1. *When formulating new AI laws and policies, it is essential that the rights of creators and copyright owners be respected.* When making determinations about AI policies, it is vital for policymakers and stakeholders to understand that any new laws and policies relating to AI must be based on a foundation that preserves the integrity of the rights of copyright owners and their licensing markets. The interests of developers who use copyrighted materials for ingestion by AI systems must not be prioritized over the rights and interests of creators and copyright owners.
2. *Longstanding copyright laws and policies must not be cast aside in favor of new laws or policies obligating creators to essentially subsidize the development of AI technologies.* Established copyright laws must not be weakened based on a

---

<sup>1</sup> This paper addresses topics specific to the use of copyrighted works for ingestion by AI systems. There are several other questions that will arise as to who, if anyone, is the “author” of a work generated by an AI system, who, if anyone, is responsible for any copyright infringement committed via such system, and the copyrightability of AI-generated works in general. Those subjects will be the focus of future position papers.

mistaken belief that doing so is necessary to incentivize the development of AI technologies. This is especially true when there is no evidence of market failure or problems warranting changes to the law. AI-specific statutory exceptions to copyright law that would effectively strip rightsholders of their ability to control and be compensated for the use of their copyrighted works for ingestion purposes are unnecessary and harmful and should be rejected.

3. *The ingestion of copyrighted material by AI systems implicates the right to reproduce copyrighted works.* Section 106(1) of the Copyright Act vests copyright owners with the right to prevent the reproduction of their copyrighted works. When an unauthorized copy is made of a work protected by copyright, there is a violation of the copyright owner's right to reproduce the work, absent a valid defense. It is important to understand that copyright infringement at the input stage is distinguishable from infringement at the output stage because the reproduction right is a "stand-alone" right—it is violated by copying a work (without authority or defense) regardless of whether a specific output of an AI system is infringing.
4. *The ingestion of copyrighted material by AI systems is not categorically fair use.* Determining whether a particular use qualifies for the fair use defense to infringement requires a fact-specific inquiry that is considered on a case-by-case basis. There are no uses that always, categorically qualify as fair use. That is no less true when copyrighted work are used for AI ingestion. In fact, the typical commercial system's ingestion of copyrighted works is particularly unlikely to qualify as fair use when the AI system generates competing works. Courts will need to evaluate fair use defenses involving AI systems the same way they evaluate fair use in all contexts: by applying the four factors set forth in section 107 of the Copyright Act to the specific uses at issue. Under the first factor, ingestion is unlikely to be a transformative use since the output generated by these AI systems will often serve the same exact purpose as the works ingested, especially in the case of music and art. However, even if the use is held to be transformative, as the Supreme Court recently made clear in *Andy Warhol Foundation v. Goldsmith*, whether a use is transformative is not dispositive of the question of fair use and is merely one of the considerations under the first fair use factor. In addition, under the fourth factor, when courts consider the extent of the "effect of the use upon the potential market for or value of" the works ingested by that system, they may conclude that such ingestion will have a significant adverse impact on the value and market for the copyrighted work. This is especially true when copyright owners have made licenses available in the market for AI training. Finally, as we discuss more in response to question eight, the second factor may often weigh against a finding of fair use, and the third factor will either weigh against fair use or be neutral.

5. *AI companies should license works they ingest.* No AI-copyright policy should be adopted in response to generative AI that interferes with the free market or the freedom to license. It is essential that the licenses be respected by any copyright or AI legal regime. Obtaining a license to use copyrighted works is the best way for developers to ensure they avoid infringement liability. Further, if licensing markets exist or are being developed, it can weigh against a finding that copying without the permission of the copyright owner is excused by the fair use defense. The marketplace should continue to properly value and incentivize creativity, and AI policy should not interfere with the right of copyright owners to choose whether to license, or not to license, their works for AI purposes. Copyrighted works provide immense value to AI developers, and they can and should pay for that value—as many today are already doing. In other words, when properly applied, copyright law sets the conditions for the market to prevail.
6. *AI systems must implement safeguards to prevent infringing AI-generated outputs.* Overfitting and allowing prompts that call for copyright protected-material and “in the style of” are more likely to result in AI-generated outputs that infringe one or more copyrighted works. While merely imitating the style of an existing artist does not constitute infringement, it is essential that AI companies implement effective safeguards to prevent the likelihood of output-related infringements. This is yet another reason why AI companies should voluntarily license ingested works because when they do so, the parties can negotiate these safeguards.
7. *Transparency regarding ingestion of copyrighted works by businesses that offer generative AI systems to the public will help ensure that the rights of copyright owners are respected, and that AI development is being implemented in a way that is responsible and ethical.* Adequate and appropriate transparency and record-keeping benefit both copyright owners and AI developers in resolving questions regarding infringement, fair use, and compliance with licensing terms. Transparency has many other benefits unrelated to copyright such as promoting safe, ethical, and unbiased AI systems. Consequently, transparency by businesses that offer generative AI systems to the public is a crucial component of any AI policy. Best practices should include maintaining records of what copyrighted works are being ingested and how those works are being used, except where the AI developer is also the copyright owner of the works being ingested by the AI system. Those records should be publicly accessible and searchable as appropriate and subject to reasonable confidentiality provisions the parties to a license might negotiate as well as the aforementioned exception.