

Using Past Legislation as a Template for Future AI Licensing Legislation

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Artificial intelligence (“AI”) has become a major public policy issue in Washington across a range of industries.¹ The copyright community has also been focused on AI policy, most notably over the issues of training AI models on copyrighted works and the copyrightability of generative AI. This Article focuses on AI training. Copyright issues surrounding training are currently the subject of significant litigation in U.S. district courts, predominantly the Southern District of New York in which the fair use defense has been raised by AI companies.²

Copyright issues surrounding AI training may very well reach the U.S. Supreme Court. There is certainly enough money at risk on both sides of the issue to make it likely that at least once of the many current cases will eventually be heard by the Court. If the Supreme Court determines that a license is *not* generally required, the licensing question (and the basis for this Article) ends the day such a decision is announced. If, however, the Supreme Court determines that a license is often required, Congressional

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1. See Press Release, Chuck Schumer, Senate, Following Historic AI Insight Forums Over The Past Year, Leader Schumer, Senators Rounds, Heinrich, & Young Reveal Bipartisan Roadmap For Artificial Intelligence Policy In The United States Senate (May 15, 2024), <https://www.schumer.senate.gov/newsroom/press-releases/following-historic-ai-insight-forums-over-the-past-year-leader-schumer-senators-rounds-heinrich-and-young-reveal-bipartisan-roadmap-for-artificial-intelligence-policy-in-the-united-states-senate> [https://perma.cc/HM8Q-SACS] [https://web.archive.org/save/https://www.schumer.senate.gov/newsroom/press-releases/following-historic-ai-insight-forums-over-the-past-year-leader-schumer-senators-rounds-heinrich-and-young-reveal-bipartisan-roadmap-for-artificial-intelligence-policy-in-the-united-states-senate].

2. See Kevin Madigan, *Mid-Year Review: AI Lawsuit Developments in 2024*, COPYRIGHT ALL. (July 25, 2024), <https://copyrightalliance.org/ai-lawsuit-developments-2024/> [https://perma.cc/F2KV-KW5R] [https://web.archive.org/web/20250124180219/https://copyrightalliance.org/ai-lawsuit-developments-2024/].

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action to enable either collective or compulsory license may be needed in certain circumstances even though direct licensing has already occurred and will no doubt continue.

From 2004 to 2007, I served as copyright counsel to then-House Judiciary Chairmain James Sensenbrenner of Wisconsin during which time I led weekly Congressional negotiations over two copyright bills. The first bill was an update to the Section 115 compulsory music licensing system. The legislation, titled the Section 115 Reform Act, was designed to modernize a paper-based licensing system for the digital music services era.³ The second bill, titled the Orphan Works Act, was a copyright industry-wide bill to address the longstanding orphan works licensing problem on a work-by-work basis.⁴ Neither bill was signed into law by Congress, although an updated version of the Section 115 Reform Act later became the now-enacted Music Modernization Act of 2018.⁵ One could also say that the Music Modernization Act proved that Congressional staff never leave since I was the lead negotiator on that bill as well. Although none of these three bills had anything directly to do with AI, Congress often builds upon what it has previously debated or enacted as a basis for future legislation. Thus, it is possible that the prior music licensing and orphan works bills could provide some basis for AI licensing legislation.

I. THE SECTION 115 REFORM ACT AND THE MUSIC MODERNIZATION ACT

Since the enactment of the 1976 Copyright Act, Section 115 of Title 17 created a compulsory license for musical works. With the creation of a compulsory license first codified in the 1909 Copyright Act for piano rolls following the *White-Smith Publishing Co. v. Apollo* decision, the scope of the compulsory license was expanded in addition to the length and complexity of Section 115.⁶ As the music business became increasingly digital in the late 1990s, it became apparent the Section 115 license was not up to the task. As the Register of Copyrights noted in 2004, “the means to create and provide music to the public has changed radically in the last decade, necessitating changes in the law to protect the rights of copyright owners while at the same time balancing the needs of the users in a digital world.”⁷ Disputes over what license was needed and how digital service providers could obtain licenses for every musical work ever commercialized meant that a wholesale update to Section 115 was necessary for digital services. After lengthy negotiations, the Section 115 Reform Act was drafted to create a designated

3. Section 115 Reform Act of 2006, H.R. 5553, 109th Cong. (2006).

4. Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006).

5. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

6. *White-Smith Music Publ'g. Co. v. Apollo Co.*, 209 U.S. 1, 8 (1908).

7. *Section 115 of the Copyright Act: In Need of an Update?: Hearing Before the Subcomm. on Cts., the Internet, & Intell. Prop. of the H. Comm. on the Judiciary*, 108th Cong. 16 (2004) (statement of Marybeth Peters, Register of Copyrights).

agent system where licensees could obtain licenses for specific works represented by that designated agent along with one general designated agent for works not represented by a designated agent.⁸ It was expected that at least some of the designated agents would be existing entities. Finally, some of the works to be represented by the proposed general designated agent were effectively orphan works.

Although numerous interests in the music community came together to negotiate the Section 115 Reform Act, the legislation was never signed into law due to opposition by some music entities dissatisfied with the outcome of the negotiations. Twelve years later, a significantly updated version of the legislation was advanced through Congress into law as the Music Modernization Act. Among the major differences between the earlier and later efforts was the replacement of the competing designated agent system in the Section 115 Reform Act with a single new entity authorized by the Music Modernization Act to be responsible for issuing the licenses along with royalty collection and distribution.⁹ This new entity is now known as the Mechanical Licensing Collective based in Nashville, Tennessee.¹⁰

In the years between the negotiating and drafting of the two bills, the music industry had effectively concluded that a single licensor system was preferable to a multi-licensor system. In 2003, an entity named SoundExchange was created to distribute Section 114 royalties. Since its creation, SoundExchange has distributed over \$11 billion in royalties to performers. SoundExchange is the only entity that serves in this role.¹¹ The generally positive experiences with SoundExchange no doubt influenced the preference for a single entity being responsible for royalty distribution.¹²

II. THE ORPHAN WORKS ACTS OF 2006 AND 2008

An orphan work is commonly defined as a creative work whose copyright status and ownership cannot be determined.¹³ Events that cause works to be considered orphan include, but are not limited to, no formal registration with the U.S. Copyright Office or other databases, deceased creators with unclear heirs, and bankrupt companies with no successors.¹⁴ Testimony provided during debate over orphan works legislation

8. H.R. 5553 109th Cong. § 115(e)(9) (2009).

9. See Designation of Music Licensing Collective and Digital Licensee Coordinator, 84 Fed. Reg. 32274 (July 8, 2019).

10. See *About Us*, MLC, <https://www.themlc.com/our-story> [<https://perma.cc/C5P7-KHK5>] (last visited Feb. 23, 2025).

11. See *About SoundExchange*, SOUNDEXCHANGE, <https://www.soundexchange.com/who-we-are/> [<https://perma.cc/VJB9-KG62>] [<https://web.archive.org/web/20250320094838/https://www.soundexchange.com/who-we-are/>] (last visited Mar. 27, 2025).

12. Note that two important distinctions between the Mechanical Licensing Collective (“MLC”) and SoundExchange are: (1) that the governance structure for the MLC is more explicitly set out in statute in 17 U.S.C. § 115(d)(1)(D) than that of SoundExchange; and (2) 17 U.S.C. § 115(d)(7) requires that the operational costs of the MLC be borne by the licensees, which is unprecedented in the U.S. copyright system. This difference could be subject to further debate should Congress consider legislation related to AI licensing.

13. U.S. COPYRIGHT OFF., REPORT ON ORPHAN WORKS 15 (2006).

14. *Id.* at 23–35.

indicated that in some cases, copyright owners were missing potential revenue from not being able to be identified.¹⁵ However, there are several other societal reasons to encourage the reuse of orphan works such as enabling more accurate historical research and preservation, perhaps funded by sales of copies.

Although orphan works legislation was never signed into law, the discussion of the legislation highlighted the issue of copyright owners having no effective remedies system for smaller value works. Copyright owners with lower licensing fees were faced with an unenviable task. Since it would cost owners more in attorney and court fees to pursue a user who refused to pay, bad faith users could game the system by refusing to pay any license fee. In response to this dilemma, Congress asked the U.S. Copyright Office in October 2011 to study copyright small claims and submit recommendations to Congress.¹⁶ The Copyright Office report became the basis for the Copyright Alternative in Small-Claims Enforcement (“CASE”) Act that was signed into law in December 2020 and created the Copyright Claims Board.¹⁷

III. TRAINING NEEDS OF ARTIFICIAL INTELLIGENCE MODELS

Since the accuracy of an AI model requires training upon the broadest set of accurate works on which that model can be trained, well-known news publications appear to have been the most used as training sources, given the large number of news companies among the initial litigants against AI companies.¹⁸ Along with this litigation, AI companies have also begun to enter into a limited number of licensing arrangements with news publications, such as the agreement struck between OpenAI and the Wall Street Journal and a series of deals with Shutterstock.¹⁹ The reasons for striking such deals are only known to the parties, but might include that the licensing price was right, the guarantee that the training content is authoritative, the litigation risk in not obtaining a license was too high and/or a belief that fair use may not apply for the

15. *Report on Orphan Works by the Copyright Off.: Hearing Before the Subcomm. On Cts., the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. 2–3 (2006); *Orphan Works: Proposals for a Legislative Solution: Hearing Before the Subcomm. On Intell. Prop. of the S. Comm. on the Judiciary*, 109th Cong. 2–5, 105–28 (2006).

16. Letter from Lamar Smith, Chairman, H. Comm. on the Judiciary to Maria A. Pallante, Register of Copyrights & Dir., U.S. Copyright Off. (Oct. 11, 2011), in U.S. COPYRIGHT OFF., COPYRIGHT SMALL CLAIMS: REPORT OF THE REGISTER OF COPYRIGHTS (2013).

17. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

18. See Madigan, *supra* note 2.

19. Alexandra Bruell et al., *OpenAI, WSJ Owner News Corp Strike Content Deal Valued at Over \$250 Million*, WALL ST. J. (May 22, 2024), <https://www.wsj.com/business/media/openai-news-corp-strike-deal-23f186ba> [https://perma.cc/4RBP-YWA5] [https://web.archive.org/web/20250124232016/https://www.wsj.com/business/media/openai-news-corp-strike-deal-23f186ba]; Jeremy Gray, *Shutterstock Made \$104 Million Licensing Assets To AI Devs Last Year*, PETAPIXEL (June 4, 2024), <https://petapixel.com/2024/06/04/shutterstock-made-104-million-licensing-assets-to-ai-devs-last-year/> [https://perma.cc/7CHD-FWR9] [https://web.archive.org/web/20250124232609/https://petapixel.com/2024/06/04/shutterstock-made-104-million-licensing-assets-to-ai-devs-last-year/].

works available for licensing. A new trade association representing the growing number of licensing entities, the Dataset Providers Alliance, was also created in 2024.²⁰

Given what appears to have been an effort by AI companies to obtain as wide a variety of works as possible for AI training, it remains to be seen whether AI models can be trained properly on commercially available databases. It does appear possible, and perhaps likely, that the desire by AI companies to train their models on as many works as possible will exceed the available corpus of works that are readily available to license.

Filling this training gap could require Congress to create authorities for new licensing collective(s) or a compulsory license system to solely address unrepresented works.

IV. USING THE MUSIC MODERNIZATION ACT AND ORPHAN WORKS ACT AS A LEGISLATIVE TEMPLATE

Congress tends to look to past legislation as a template for future legislation, most recently with the Section 115 Reform Act being used as the starting point for negotiation of the Music Modernization Act. Given the voluntary licensing of select copyrighted works by AI companies that has already occurred, it is likely that such voluntary licensing in the free market will continue. However, some number of copyright owners will not be readily identifiable (the orphan works problem) and/or the negotiating costs of either or both parties will exceed the potential licensing revenue for works with low economic value. It is in this commercial space that legislation could be impactful.

Building from the Orphan Works Act of 2006 and 2008, one option would be for Congress to create a system similar to the orphan works bill in which AI companies could use works for training only after conducting a search for the copyright owner and pay a license fee if and when they appear. However, given the negotiating imbalance and negotiating costs, the interests of smaller copyright owners may be better protected with a collective licensing organization and perhaps, even a compulsory license.

V. OBSTACLES IN USING THESE BILLS AS A TEMPLATE

Although there are some historical parallels that might appear similar to those that motivated past policy debates, there are some critical differences that, at a minimum, make it likely that any movement to create any AI related legislation to be several years away.

As noted at the beginning of this Article, the first obstacle to a compulsory license for AI training is the current copyright litigation that is still in its early stages. There has been no final district court decision on the key fair use issue, never mind any

20. DATASET PROVIDERS ALLIANCE, <https://www.thedpa.ai/> [https://perma.cc/6UDE-UX3A] [https://web.archive.org/web/20250520140609/https://www.thedpa.ai/] (last visited May 20, 2025).

appellate review. Given the large number of pending fair use cases surrounding AI training, there is a solid chance that the fair use question will ultimately be addressed by the Supreme Court several years from now. It is unlikely that either copyright owners or AI companies will agree to a collective or compulsory licensing system prior to such a ruling.

Contrast this to the policy negotiations over the Section 115 Reform Act and the Music Modernization Act. With a compulsory mechanical license authorized by statute since 1909, there was never a debate as to whether a license was required to cover the uses envisioned by the two bills. The question was simply about which entity (or entities) to pay and how the rate should be set.

The second obstacle is that, unlike the orphan works bill, the two music bills were focused only on one type of work for a specific group of licensees. Should the federal courts ultimately determine that copyright owner permission is required for the use of their works for training, AI companies will need to obtain licenses for a wide variety of types of works, which is more like the issue to have been addressed by the proposed Orphan Works Act that was written to cover all types of works and uses.

A third obstacle is that not all sectors of the copyright world have a single well-organized membership group that already collects royalties on behalf of their members. Such entities would be obvious candidates to operate a collective licensing system for their part of the copyright world. In contrast, there are a large number of photography trade associations who do not currently offer licensing services on behalf of their members, including the Professional Photographers of America, the American Society of Media Photographers, the Photographic Society of America, and American Photographic Artists.²¹ If more than one of these photography groups were interested in running a collective licensing system for photographers, should the Copyright Office be authorized to pick one of them?

Even those sectors of the copyright industry that do have organized membership groups often limit who they represent to a smaller subset. As an example, AI companies that might want to license bloggers currently have no licensing body to turn to.²² The closest such entity is the Authors Guild that offers a standard membership which covers:

21. See PRO. PHOTOGRAPHERS OF AM., <https://www.ppa.com/> (last visited Mar. 27, 2025); AM. SOC'Y OF MEDIA PHOTOGRAPHERS, <https://www.asmp.org/> [<https://perma.cc/7TVN-CDU2>] [<https://web.archive.org/web/20250320235956/https://www.asmp.org/>] (last visited Mar. 27, 2025); PHOTOGRAPHIC SOC'Y OF AM., <https://psaphotoworldwide.org/> [<https://web.archive.org/web/20250313112541/https://psa-photo.site-ym.com/default.aspx>] (last visited Mar. 27, 2025); AM. PHOTOGRAPHIC ARTISTS, <https://apanational.org/> [<https://perma.cc/4BRN-ZVCM>] (last visited Mar. 27, 2025).

22. Although the value of blogger content is unknown, the \$60 million in revenue collected by Reddit so far for its licensing efforts suggest that blog content may also have significant value. See Anna Tong et al., *Exclusive: Reddit in AI Content Licensing Deal with Google*, REUTERS (Feb. 21, 2024), <https://www.reuters.com/technology/reddit-ai-content-licensing-deal-with-google-sources-say-2024-02-22/> [<https://perma.cc/85XL-WBC9>] [<https://web.archive.org/web/20250124232754/https://www.reuters.com/technology/reddit-ai-content-licensing-deal-with-google-sources-say-2024-02-22/>].

- Traditionally published authors, translators, and illustrators with at least 1 published book in the U.S.
- Self-published authors who have made at least \$5,000 in the past 18 months from their writing
- Freelance writers who have published 3+ pieces or made \$5,000 in the past 18 months.²³

A blogger whose work has been ingested into an AI model may never qualify to be an Authors Guild member under its current requirements.

The final obstacle to legislation is the general lack of legislative activity by Congress. A bill to address the licensing of unrepresented works is unlikely to be able to compete with bigger bills that Congress already has trouble with such as funding federal government operations.

VI. SO IS LEGISLATION IN THIS AREA LIKELY TO BE ENACTED ANYTIME SOON?

It is hard to start negotiations when no one wants to be at the table. However, once the proverbial dust settles from a likely Supreme Court decision in this area in a few years, the numerous interested licensors and licensees will need to reconsider their negotiating positions. If the Supreme Court rules that licenses are rarely, if ever, needed, then the debate is effectively over, unless Congress were to overturn the Court's decision. Given recent Congressional dysfunction, that seems highly unlikely. If the Supreme Court rules that licenses are needed, then the negotiations in the free market, as well as legislative negotiations over what works remain, will ramp up. Although negotiations over the Music Modernization Act alone took several years, the amount of time it took for reform of Section 115 to be completed is longer when one factors in the precursor efforts negotiating the Section 115 Reform Act.

23. See *Membership*, AUTHORS GUILD, <https://authorsguild.org/membership/> [<https://perma.cc/PX43-LA25>] [<https://web.archive.org/web/20250124232830/https://authorsguild.org/membership/>] (last visited Jan. 24, 2025).