WHERE MELODIES EMERGE FROM ALGORITHMS: A DISSECTION OF THE NEED FOR A LICENSING STRUCTURE IN A WORLD OF AI-GENERATED MUSIC

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ABSTRACT

Generative Artificial Intelligence ("AI") camouflages its products among human-made creations, expanding the boundaries of the music industry as we know it. Since the widespread introduction of generative AI systems, and since the announcement that many major companies intended to develop their own AI programs, there has been little response from legislators regarding how to reconcile projects made by human creators with those created by artificial intelligence. The current method of generative AI infringes on artists' copyright of their work and does not constitute fair use. To accommodate for artists' consent and compensation, the best option for resolving this divide would be to enforce the compulsory licensing scheme provided by the Copyright Act of 1976. This would allow artists to receive a marginal amount of money in exchange for allowing their songs to be copied into the program while still following the decision of Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith.

The doctrine of fair use has enabled countless parties to claim that the process of generative AI is transformative and, thus, fair use. However, this Note provides that such a construction of the fair use defense fails to recognize that generative AI encourages users to appropriate

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music's expressive value. This factor of generative AI qualifies it as an infringing use and not a fair use. Since this constitutes an act of infringement, the best remedy would be to create a compulsory license for generative AI, as this license would allow artists to use the technology in a beneficial way instead of endorsing infringement. This suggested compulsory license for generative AI would mirror many elements that are already accepted in the Copyright Act. By supplying a license, this Note argues that Congress would be effectively allocating economic incentives in order to foster a creative environment that benefits the public.

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INTRODUCTION

Music provides a soundtrack to our kindergarten assemblies, our family vacations, our first heartbreaks, our first dances, and, more generally, our lives.[1] Musicians have the unique power of bottling up the warm, joyful sunlight that hits the empty floors when moving into your first apartment and saving that feeling in the fixed form of a song to be replayed whenever one chooses to remind themselves of that memory.[2] Simultaneously, the power extends to the ability to comfort us in times of loss, whether that comfort comes in a time of grieving or in a moment of celebration of the lives of those not around us anymore.[3] It has this timeless, magnetic attraction to our chaotic, dynamic lives whether we realize it or not.[4] However, music as we know it is transforming and incorporating technology in an unprecedented form.[5]

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1. *See generally* INT'L FED'N OF THE PHONOGRAPHIC INDUS., ENGAGING WITH MUSIC 2023 6–7 (2023) [hereinafter ENGAGING WITH MUSIC], https://www.ifpi.org/wp-content/uploads/2023/12/IFPI-Engaging-With-Music-2023_full-report.pdf (reporting that humans seize the opportunity to engage with music on a regular basis, such that the average person listens to 20.7 hours of music every week).

2. *See generally* Marlene Cimons, *Why Music Causes Memories to Flood Back*, WASH. POST (Feb. 26, 2023), https://www.washingtonpost.com/wellness/2023/02/26/songs-music-memory-connection/ [https://perma.cc/3LAV-C2XG] (discussing a study which showed that music is more intimately tied to autobiographical memories than other memory cues, such as foods or facial recognition).

3. *See generally* ENGAGING WITH MUSIC, *supra* note 1, at 12–13 (reporting that "71% of people say music is important to their mental health[,]" "78% say music helps them relax and cope with stress[,]" and, "if in [the] hospital and in pain[,] 87% of people say they would like to listen to music to help them cope").

4. *See generally* Madeline Gearheart, *How Well Do Zoomers & Boomers Know Each Other's Music? [Survey]*, CENTURYLINK, https://www.centurylinkquote.com/resources/generational-gap-in-music/ [https://perma.cc/MB9L-6Y3Z] (Nov. 9, 2022) (reporting the degree to which Gen Z recognizes music from earlier generations). Social media is to thank for connecting generations of music, keeping songs from the 1960s and 1970s timeless. *See id.* About 88% of Gen Z recognized "More Than a Woman" by the Bee Gees, largely in part due to the song's popularity on TikTok. *Id.*

5. *See* Bernard Marr, *Generative AI Is Revolutionizing Music: The Vision for Democratizing Creation*, FORBES, https://www.forbes.com/sites/bernardmarr/2023/10/05/generative-ai-is-revolutionizing-music-loudlys-vision-for-democratizing-creation/?sh=4c3be05b775b [https://perma.cc/57SJ-YVT2] (Oct. 5, 2023, 3:41 AM).

Musical boundaries are expanding with the introduction of generative artificial intelligence ("AI"),[6] a computer software that enables users to create musical works almost indistinguishable from human-created songs.[7] Mere months after the introduction of this technology to the consuming public, social media erupted with reactions to a viral song titled "Heart on My Sleeve," which apparently featured a collaboration between Drake and The Weeknd.[8] The song displayed the strong work product of a generative AI algorithm that recreated the voices of the famous artists rather than the work of the artists themselves.[9] Many were impressed, some were fearful, but without a doubt, the strongest reaction came from Drake and The Weeknd's record label, Universal Music Group ("UMG").[10] UMG required the song to be stripped from streaming services as a copyright violation, claiming that there was no permission granted to utilize the artists' voices in this

6. Artificial intelligence, broadly, is a "general classification of automated systems designed to perform tasks typically associated with human intelligence or cognitive functions." Artificial Intelligence and Copyright, 88 Fed. Reg. 59942, 59948 (Aug. 30, 2023). Generative AI is a subset of the larger category of artificial intelligence, such that "generative models encode a simplified representation of their training data and draw from it to create a new work . . . ." Kim Martineau, *What Is Generative AI?*, IBM RSCH. BLOG (Apr. 20, 2023), https://research.ibm.com/blog/what-is-generative-AI [https://perma.cc/MK4S-H9YZ]; *see* discussion *infra* Section I.A.

7. Kazimierz Rajnerowicz, *AI or Not: How to Tell if Art Is AI Generated or Real [AI Test]*, TIDIO, https://www.tidio.com/blog/ai-test/#ai-music [https://perma.cc/6ZZ2-S5F8] (Aug. 26, 2024) (finding that, in a survey of whether people could tell the difference between a human authored track and an AI generated track, "music was the most difficult of all the categories" to distinguish, as only 47% of respondents correctly identified a Bach-inspired AI-generated music sample as created by artificial intelligence).

8. Mark T. Goracke, *The Summer of "Deep Drakes": How Generative AI Is Creating New Music and Copyright Issues*, HOLLAND & KNIGHT (May 2, 2023), https://www.hklaw.com/en/insights/publications/2023/05/the-summer-of-deep-drakes-how-generative-ai-is-creating-new-music [https://perma.cc/K46F-Q4SJ]. The Weeknd and Drake both possess strong global presences, respectively ranking as the third and fourth most streamed artists globally on Spotify during 2023. *The Top Songs, Artists, Podcasts, and Listening Trends of 2023 Revealed*, SPOTIFY (Nov. 29, 2023), https://newsroom.spotify.com/2023-11-29/top-songs-artists-podcasts-albums-trends-2023/ [https://perma.cc/J26Y-R88B].

9. Goracke, *supra* note 8.

10. *See id.*

technology.[11] This attack initiated a surge of confusion among artists, labels, and others—how would the music industry proceed now that it was aware of this force looming over everyone's shoulders?[12]

Since the introduction of AI-generated music into streaming platforms, the public's reactions changed to hesitant acceptance—many are welcoming of the new technology but fear whether these tools will unlock a dangerous reality.[13] Some artists have lent their voices to experimental programs to assist with developing the algorithms, but others outside of the AI orbit are skeptical about donating their creative capacities to this new technology.[14] While once a hawk in policing AI-generated content, UMG now collaborates with Google on a new AI program called Dream Track, seeking a licensing agreement for its artists in order to, in the words of UMG chairman and CEO Lucian Grainge, "provid[e] them access to the kind of opportunities and cutting-edge creative tools made possible by AI."[15] Amidst all of this noise, the law remains dangerously silent with respect to any regulation of the creative process that accommodates for artificial intelligence.[16]

Historically, the music industry has adapted to technologies in order to promote the progression of the creative

11. Chloe Veltman, *Google's Latest AI Music Tool Creates Tracks Using Famous Singers' Voice Clones*, NPR (Nov. 17, 2023, 5:01 AM), https://www.npr.org/2023/11/17/1213551049/googles-latest-ai-music-tool-creates-tracks-using-famous-singers-voice-clones [https://perma.cc/ATH8-S2SY].

12. *See id.*

13. *See* ENGAGING WITH MUSIC, *supra* note 1, at 11 ("76% [of fans aware of AI's capabilities] think that an artist's music or vocals should not be used or ingested by AI without permission.").

14. Veltman, *supra* note 11.

15. *Id.*

16. *See* Emilia David, *Musicians Are Eyeing a Legal Shortcut to Fight AI Voice Clones*, THE VERGE (Sept. 21, 2023, 11:00 AM), https://www.theverge.com/2023/9/21/23836337/music-generative-ai-voice-likeness-regulation [https://perma.cc/M93D-B9G5] ("[A] new legal framework [concerning AI-related intellectual property regulation] remains months or possibly years away if it happens at all.").

process, starting with the acceptance of a player piano[17] and eventually reaching a reality in which subscribers pay a monthly fee to stream music.[18] However, there is no existing basis for allowing these generative AI programs to first gather data for their programs by copying another artist's voice or songwriting style without permission, and then generate new content with that copyrighted material.[19] The silence of United States copyright law regarding the infringement on the input side of generative AI technologies operates as an acquiescence to the unlawful copying of another's creation.[20] Therefore, this Note will argue that the current method of generative AI infringes on artists' copyright of their work and does not constitute fair use.[21] To accommodate for artists' consent and compensation, legislators should enact an amendment that provides a statutory license for AI-generated music. Accordingly, this Note argues that such a structure will allow artists to utilize generative AI productively, rather than stifling the development of the technology, while also maintaining a level of agency in their own works.

Part I of this Note explains the function of artificial intelligence systems, summarizes the response of the Copyright

17. *See, e.g.*, White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 17–18 (1908) (holding that player piano technology did not infringe the copyright of the musical composition since the perforated rolls were not "a copy of a musical composition . . . [in] 'a written or printed record of it in intelligible notation'").

18. *See* Mary LaFrance, *Music Modernization and the Labyrinth of Streaming*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 310, 312 (2018) (tracking how technological changes have transformed copyright law through various amendments). Despite both the large paradigm shift in the consumption of music today and Congress's reform with the Music Modernization Act in 2018, "the federal copyright regime for music and sound recordings is still based largely on laws that were designed for piano rolls and vinyl records." *Id.* at 311.

19. *See* James Vincent, *The Scary Truth About AI Copyright Is Nobody Knows What Will Happen Next*, THE VERGE (Nov. 15, 2022, 10:00 AM), https://www.theverge.com/23444685/generative-ai-copyright-infringement-legal-fair-use-training-data [https://perma.cc/B8V7-WZ9M].

20. *See, e.g.*, CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., LSB10922, GENERATIVE ARTIFICIAL INTELLIGENCE AND COPYRIGHT LAW 5 (2023) (claiming that Congress could benefit from a passive "wait-and-see approach" before committing to a side on this issue, which would essentially accept whatever status quo develops).

21. *See* 17 U.S.C. § 107.

Office to these new programs, and details some initial arguments surrounding the incorporation of generative AI's creative potential. Part II of this Note provides an overview of copyright law in the music industry by explaining the relevant provisions of the Copyright Act of 1976, describing fair use and transformative works, and summarizing how courts have interpreted copyright law in the wake of new technologies. Part III discusses evidence of copyright infringement through the process of AI memorization. Part IV demonstrates that the current operation of generative AI is copyright infringement and not fair use, and it provides an answer to how licensing will work to accomplish the goals of copyright protection in the context of generative AI.

I. GENERATIVE ARTIFICIAL INTELLIGENCE

Debates and critiques of artificial intelligence surged within the last year, villainizing AI and stressing how the new technology sterilizes creativity by removing the human element from expressive art forms.[22] Part of the opposition to artificial intelligence being involved in the creative process emerges from fears about the technology.[23] To many, the rapid growth of generative AI in creative industries imposes a threat that cheaper, faster AI bots will empty and sterilize expressive outlets.[24] These fears reflect the desire to control AI—to maintain human-authored works as the supreme form of

22. James Sammataro & Nicholas Saady, *How Much Humanity Will AI-Generated Songs Need To Be Copyrightable?*, BILLBOARD (Jan. 27, 2023), https://www.billboard.com/pro/ai-generated-music-songs-copyright-legal-questions-ownership/ [https://perma.cc/A4FC-VWAZ].

23. *See* Sam Jay, *Survey Highlights Faculty Perception of Generative AI*, METRO. STATE UNIV. OF DENVER (Feb. 20, 2024), https://www.msudenver.edu/early-bird/survey-highlights-faculty-perception-of-generative-ai [https://perma.cc/REB7-MSB2] ("78% of respondents admitted that unfamiliarity with generative AI was the driving factor behind their nonuse.").

24. *See* Rajnerowicz, *supra* note 7. There is a large fear of "human inferiority to AI" within the context of generative AI's creative capacities. *Id.*

creativity.[25] The fears, in many ways, react to the abstract features of artificial intelligence that make it so difficult to regulate: its uncertainty, unpredictability, and complexity.[26] An investigation into how these generative AI models are created and trained reveals that there is truth to the fact that these works are potentially infringing on already-existing creative material.[27] Therefore, it is vital to think about the method through which generative AI functions, as this information illustrates potential copyright law implications for artists.[28] Thus, this Part dissects the operation of generative AI by highlighting the underpinnings of the programs, looking at how they digest data of copyrighted works, and recognizing the merits of AI's potential. It will examine how other entertainment industries have responded to the boom of generative AI. Finally, this section will introduce the largest entrant into the battle between copyright and AI: *The New York Times*.

A. Understanding the Basics of Generative AI

As the public and the law adjust to the introduction of generative artificial intelligence into the catalog of creative tools, corporations continue to invest in artificially produced music by developing algorithms.[29] At this point, each artificial

25. *See id.* Other discussions around AI have been inherently anthropocentric and view "the pursuit of human-like intelligence as the golden standard for Artificial Intelligence." J.E. (Hans). Korteling, G.C. van de Boer-Visschedijk, R.A.M. Blankendaal, R.C. Boonekamp & A.R. Eikelboom, *Human- Versus Artificial Intelligence*, FRONTIERS A.I., Mar. 25, 2021, at 1, 1. *But see* Rajnerowicz, *supra* note 7 (rationalizing the survey results unsuccessfully distinguishing between AI and human-composed music with participants' expectations that "songs were . . . too bad/chaotic for 'smart' artificial intelligence or too good/complex for a human.").

26. *See* Vincent, *supra* note 19.

27. *See* Katherine Lee, A. Feder Cooper & James Grimmelmann, *Talkin' Bout AI Generation: Copyright and the Generative-AI Supply Chain*, J. COPYRIGHT SOC'Y U.S. (forthcoming 2024) (manuscript at 16–17) (on file with authors), https://james.grimmelmann.net/files/articles/talkin-bout-ai-generation.pdf.

28. *See id.*

29. *See* Anna Nicolaou & Madhumita Murgia, *Google and Universal Music Negotiate Deal over AI 'Deepfakes,'* FIN. TIMES LTD. (Aug. 8, 2023), https://www.ft.com/content/6f022306-2f83-4da7-8066-51386e8fe63b [https://perma.cc/95G6-BCH8].

intelligence program possesses unique contours, but many of them similarly employ a machine learning process that trains the programs to "identif[y] and replicat[e] patterns in data," all with the end goal of allowing the AI program to "learn" and produce better results.[30] To both understand the potential for infringement and to also properly regulate the inclusion of generative AI in the creative process, it is crucial to understand this machine learning process at a basic level.[31]

1. How does generative AI work?

While much of the public has been introduced to speculative theories on the potential advancements of artificial intelligence, today's reality of generative AI is based on large language models ("LLMs"), a model of computer software that seemingly answers the famous question of whether machines are capable of thinking.[32] LLMs involve machine learning algorithms to analyze large datasets, like catalogs of music, and generate an output based on the statistical patterns in the dataset.[33] When developing a generative AI program that produces music, the model can either be trained with MIDI files, which is "a widely adopted protocol" in the music industry that involves "transmitting musical information between digital devices," or the programs can rely on raw audio data of

30. Vincent, *supra* note 19.

31. *See* Lee et al., *supra* note 27, at 16.

32. Matthew Sag, *Copyright Safety for Generative AI*, 61 HOUS. L. REV. 295, 299 (2023). Turing's Imitation Game (1950), referred to as the "Turing Test," invites a lay observer to ask questions to both a human and a machine with the goal of being able to distinguish between the two. *The Turing Test*, STAN. ENCYCLOPEDIA OF PHIL., https://plato.stanford.edu/entries/turing-test/#Tur195ImiGam [https://perma.cc/6LRH-H45Y] (Oct. 4, 2021). Turing himself believed that "in about fifty years' time it will be possible to programme computers . . . to make them play the imitation game so well that an average interrogator will not have more than 70 percent chance of making the right identification after five minutes of questioning." *Id.*

33. Artificial Intelligence and Copyright, 88 Fed. Reg. 59942, 59949 (Aug. 30, 2023) (defining machine learning as a "technique for building AI systems that is characterized by the ability to automatically learn and improve on the basis of data or experience, without relying on explicitly programmed rules"); *see* Lee et al., *supra* note 27, at 4–6.

sound recordings that are translated into code to train the model.[34] Thus, an essential feature of creating a generative AI program rests on selecting the scope of the dataset.[35] Generative AI programs provide more accurate results with a vast quantity of data in the training dataset, which is why the modern trend in dataset curation consists of indiscriminately scraping any available data from the internet.[36] While this is convenient for the creators of the programs, such a process opens these programs to liability for copyright infringement by literally copying the underlying features of the dataset.[37]

After curating the dataset, the program is then trained with an algorithm to process the input data.[38] Generative machine learning allows the program to possess "multiple possible reasonable outputs" for a given input, which allows the results to possess a certain degree of randomness.[39] The generative models go through a process of obtaining inferences about the data and learning which outputs are more likely to occur, attempting to accurately predict which output would best accomplish

34. Kaushik Pal, *How Can an AI Model Create Music?*, TECHOPEDIA, https://www.techopedia.com/how-can-an-ai-model-create-music [https://perma.cc/L5KA-N4CQ] (Jan. 18, 2024).

35. *See* Alberto Romero, *A Complete Overview of GPT-3—The Largest Neural Network Ever Created*, MEDIUM (May 24, 2021), https://towardsdatascience.com/gpt-3-a-complete-overview-190232eb25fd [https://perma.cc/ZCW9-8DHB] (describing how OpenAI trained an earlier version of ChatGPT); *see also* Lee et al., *supra* note 27, at 5 (characterizing the process of selecting a training dataset as one that "requires both extensive automation and thoughtful human-curated decision-making").

36. Katherine Lee, Daphne Ippolito & A. Feder Cooper, *The Devil Is in the Training Data*, *in* AI AND LAW: THE NEXT GENERATION 1, 5 (2023), https://blog.genlaw.org/explainers/explainers.pdf (tracing the process of dataset curation from hand-annotated data compilation to the dangerous mass scraping system employed by many generative AI programs today). To this point, "curation" is a generous way to describe the selection of a training dataset. *See id.* (arguing that curation is currently the most important and nuanced choice in AI development even though "it's impossible for a creator to thoroughly understand" every piece of the dataset).

37. Sag, *supra* note 32, at 300; *see, e.g.*, Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015) (addressing a claim of copyright infringement brought by the Authors Guild after Google copied a wide assortment of books for the Google Books feature); *see also* discussion *infra* Section I.C.

38. Lee et al., *supra* note 27, at 5.

39. *Id.* at 14.

the given task.[40] To determine whether specific generations have accomplished the prompted purpose, the task of allowing the AI program to learn is supplemented through a process called "alignment."[41] For example, this process may invite user feedback by asking the user to either "thumbs-up" or "thumbs-down" the result provided by the program.[42] Such a simple metric encourages the program to replicate those responses given a "thumbs-up" based on the user's satisfaction.[43] Given the complexity of the process, training an AI program is expensive, both financially and in terms of the labor to monitor the training process.[44] Because of the cost of maintaining and developing this complex software, many AI programs have abandoned their non-profit missions, now offering subscriptions to use the AI models.[45]

2. What does generative AI create?

When generative AI is deployed, it uses the learned methods from the training data and, when provided with "genre, artist, and lyrics as input," generates a music sample based on that criteria.[46] AI in music today goes beyond just creating a shortcut for artists; it goes as far as mimicking an artist's voice

40. *Id.* at 14–15; Artificial Intelligence and Copyright, 88 Fed. Reg. 59942, 59949 (Aug. 30, 2023).

41. Lee et al., *supra* note 27, at 53–54.

42. *Id.* at 54.

43. *See id.*

44. *See* Jonathan Vanian & Kif Leswing, *ChatGPT and Generative AI Are Booming, but the Costs Can Be Extraordinary*, CNBC, https://www.cnbc.com/2023/03/13/chatgpt-and-generative-ai-are-booming-but-at-a-very-expensive-price.html [https://perma.cc/43F6-J3MV] (Apr. 17, 2023, 2:09 AM) (estimating that training advanced LLMs could cost over "'the high-single-digit millions'"); Lee et al., *supra* note 27, at 40–41.

45. *See, e.g.*, Jahnavi Nidumolu, Aditya Soni & Sheila Dang, *Elon Musk Sues OpenAI for Abandoning Original Mission for Profit*, REUTERS (Mar. 1, 2024, 5:54 PM), https://www.reuters.com/legal/elon-musk-sues-openai-ceo-sam-altman-breach-contract-2024-03-01/ [https://perma.cc/7L2A-VCVY] (discussing OpenAI using its product GPT-4 for the financial gains of Microsoft and individuals).

46. *See JukeBox*, OPENAI (Apr. 30, 2020), https://openai.com/index/jukebox [https://perma.cc/5NWV-H83D].

by analyzing an artist's particular melodies or vocal inflections to capture their unique features.[47] Some programs operate by a user recording themselves singing and applying a trained model of a specific artist's voice to replace that user's voice,[48] and others can simply provide an acoustic track for the user to later record their own vocals over.[49] With these features, fans of artists can fulfill their own requests—such as being able to resurrect the voice of John Lennon and reunite the Beatles—by simply running a program.[50]

However, "[artificial intelligence] in music is not new."[51] Turing created the first recording of computer-generated music in 1951, which introduced the concept of using computers as musical instruments.[52] Since then, artists have experimented with adding technology into their compositions, like when David Bowie implemented lyric randomizers to aid in the songwriting process.[53] The tension between human creation and artificial intelligence lies in the fact that users have the potential to either allow artificial intelligence to supplement the individual creative process rather than replacing human involvement, or to remain combative and abandon any and all involvement of artificial intelligence as a creative tool.[54]

Considering the way that artificial intelligence functions, there are two categories of concerns regarding the relative

47. *See* Sammataro & Saady, *supra* note 22.

48. Liberty Dunworth, *AI-Generated Verse in the Style of Kanye West Goes Viral*, NME (Mar. 29, 2023), https://www.nme.com/news/music/ai-generated-verse-in-the-style-of-kanye-west-goes-viral-3422349 [https://perma.cc/4JH8-KWWN].

49. *See* Marr, *supra* note 5; *see also* Veltman, *supra* note 11.

50. Goracke, *supra* note 8.

51. Sammataro & Saady, *supra* note 22.

52. Maria Popova, *September 28, 1951: Alan Turing, The World's First Digital Music, and the Poetry of Possibility*, THE MARGINALIAN, https://www.themarginalian.org/2021/09/28/alan-turing-music/ [https://perma.cc/9GAK-T7TP] (last visited Oct. 24, 2024).

53. Matthew Braga, *The Verbasizer Was David Bowie's 1995 Lyric-Writing Mac App*, VICE (Jan. 11, 2016, 3:00 PM), https://www.vice.com/en/article/xygxpn/the-verbasizer-was-david-bowies-1995-lyric-writing-mac-app [https://perma.cc/UA4D-PJQR].

54. *See* Vincent, *supra* note 19.

rights of copyright owners.[55] One side is concerned with what goes into the program in order to provide accurate results (the input argument), and the other side is concerned with whether the generated result of the AI program is, itself, a copyrightable work (the output argument).[56] In the context of AI-generated music, the input argument considers whether the training of AI models infringes on copyright by feeding the songs into an AI program without the consent of the copyright owner during the training process.[57] Under this argument, it is not just the training of the models that concerns copyright owners but also the use of those inputs to generate content that treads on infringement.[58] To accommodate the interests of both parties, companies in the process of developing AI music models suggest that artists can have the option to offer their music as an input, giving the artists some consent over their copyrighted works.[59] In practice, however, this olive branch is not consistently extended to every artist whose content is available online.[60] On the other end, the output argument considers whether an AI model's generated content is, itself, copyrightable when a non-human author heavily assists the work.[61] These questions regarding where AI-generated works fall within the scope of the legal landscape remain largely

55. Rachel Reed, *AI Created a Song Mimicking the Work of Drake and The Weeknd. What Does That Mean for Copyright Law?*, HARV. L. TODAY (May 2, 2023), https://hls.harvard.edu/today/ai-created-a-song-mimicking-the-work-of-drake-and-the-weeknd-what-does-that-mean-for-copyright-law/ [https://perma.cc/26LT-U6JB].

56. *See* Vincent, *supra* note 19.

57. Reed, *supra* note 55.

58. *See* Vincent, *supra* note 19 ("Think of it as the difference between making fake money for a movie and trying to buy a car with it.").

59. Nicolaou & Murgia, *supra* note 29.

60. *See* Vincent, *supra* note 19 (describing the degree to which a user could filter their criteria to intentionally draw on copyrighted works).

61. *Id.* For the purposes of this Note, I will only be focusing on arguments on the input-side. The output considerations are omitted from the scope of this Note, but the outputs are an essential feature to this debate on artificial intelligence in copyright law and should remain a consideration in future debates.

unanswered, and the concerns of both arguments require remedies that simultaneously encourage creation and discourage copyright infringement.[62]

B. Industry Responses

While awaiting any sort of direction from lawmakers on how to coexist with generative AI, key players in multiple creative industries have independently wrestled with the issue, each leading to unique results regarding this topic.[63] The music industry has been particularly active in lobbying for artists' rights, attempting to strike a balance between regulating generative AI to prevent infringement and respecting the creative freedom of artists who are inspired to utilize the technology.[64] As part of its research into generative AI, the Copyright Office hosted four public listening sessions—one of which focused solely on the music industry—to gather feedback from different creative industries and their perspectives on the technology.[65] Additionally, Capitol Hill has been providing a significant amount of attention to the music industry's perspective on artificial intelligence, providing seats at the table for music executives in both Senate Judiciary and House Judiciary

62. *See id.*

63. *See, e.g.*, Winston Cho, *Universal Music Files $75M Lawsuit Against Amazon-Backed AI Firm for Ripping Off Rolling Stones, Beyonce Lyrics*, HOLLYWOOD REP. (Oct. 18, 2023), https://www.hollywoodreporter.com/business/business-news/universal-music-lawsuit-rolling-stones-beyonce-lyrics-1235622348/ [https://perma.cc/9Z2L-9G6U] (addressing the method through which music labels have been attempting to block generative AI tools from reproducing and distributing songs that infringe on their artists' copyrights); Memorandum of Agreement Between the WGA and the All. of Motion Picture & Television Producers, Inc. 68–70 (Sept. 25, 2023) [hereinafter 2023 WGA Agreement], https://www.wgacontract2023.org/wgacontract/files/memorandum-of-agreement-for-the-2023-wga-theatrical-and-television-basic-agreement.pdf (illustrating the manner in which the Writers Guild of America settled the matter of artificial intelligence in screenwriting after the 2023 strike).

64. U.S. COPYRIGHT OFF., LIBR. OF CONG., TRANSCRIPT OF PROCEEDINGS: COPYRIGHT AND ARTIFICIAL INTELLIGENCE MUSIC AND SOUND RECORDINGS LISTENING SESSION 104 (2023), https://www.copyright.gov/ai/transcripts/230531-Copyright-and-AI-Music-and-Sound-Recordings-Session.pdf [hereinafter SOUND RECORDINGS LISTENING SESSION].

65. *Id.* at 3–4.

Hearings.[66] Noting that 11% of AI learning comes from the entertainment industry, these conversations could not be more timely.[67]

Since the debut of the viral AI-created song, "Heart on My Sleeve,"[68] one of the integral perspectives in the consideration of AI regulation is that of music labels, such as UMG.[69] As generative AI continues to grow, labels such as UMG assume the role of having to police works that infringe on the copyrights of their artists.[70] While currently on pace to review about 200 AI-generated works per day, UMG cautions that these investigations are limited to the ones that they find, and as the programs continue to grow, it might become impossible for labels to protect their artists if they continue to bear this burden.[71] In fact, there is nothing in the Copyright Act that places the burden of locating the individuals that create infringing uses of copyrighted works on the copyright holder, yet these music labels are doing it anyway in the absence of regulation.[72] Despite these troubles, labels do not feel the need to completely bar

66. *See* Montana Miller, *Capitol Hill Spent the Week Talking About AI: Key Takeaways for the Music Community*, RECORDING ACAD. (May 23, 2023), https://www.recordingacademy.com/advocacy/news/capitol-hill-held-discussion-about-ai-key-takeaways [https://perma.cc/8948-U6EZ]; *Oversight of the U.S. Copyright Office: Hearing Before the H. Judiciary Subcomm. on Cts., Intell. Prop., & the Internet*, 118th Cong. (2023) https://judiciary.house.gov/committee-activity/hearings/oversight-us-copyright-office [https://perma.cc/WSB5-VKW4] (providing a video recording of the hearing in front of the House Judiciary Committee and exploring the authority of the Copyright Office "in areas such as artificial intelligence"); Kristin Robinson, *At AI Hearing, UMG Asks Senate Judiciary to Protect Artists from Impersonation with New Regulations*, BILLBOARD (July 12, 2023), https://www.billboard.com/pro/ai-senate-hearing-umg-new-regulations-protect-music-artists/ [https://perma.cc/ADD2-GKC7].

67. *See* Miller, *supra* note 66.

68. Goracke, *supra* note 8.

69. Robinson, *supra* note 66.

70. SOUND RECORDINGS LISTENING SESSION, *supra* note 64, at 110.

71. *Id.*; *see, e.g.*, Cho, *supra* note 63 (providing an example of Universal Music Group taking action against AI platforms infringing on artists' copyrighted works).

72. Kevin Madigan & Rachel Kim, *Separating Fact from Fiction in the Senate IP Subcommittee's AI Hearing*, COPYRIGHT ALL. (July 27, 2023), https://copyrightalliance.org/senate-ip-subcommittees-ai-hearing-summary/ [https://perma.cc/KC5J-2L7B].

creators from incorporating the technology into their works.[73] Rather, UMG offers support for the proposition that any form of artificial intelligence that uses copyrighted music to train the algorithm should be regulated under a licensing system, such that any rule to the contrary "escapes logic."[74]

Other voices in the music industry echo these sentiments but also promote the idea that regulation should work with technology rather than against it.[75] Representatives of songwriter groups consider that, historically, efforts to constrict the use of technology have led to undesirable results, urging others to foster creativity instead of "fenc[ing] it in."[76] The Recording Industry Association of America ("RIAA") further supplements this concept, understanding that generative AI possesses the power to shape the careers of recording artists while also acknowledging that the technology is already in use.[77] The RIAA holds the great power and responsibility of using the technology in a manner that promotes the principles of copyright law, which is "[b]y and large . . . not happening today."[78]

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73. *See* CNBC Television, *Senate Judiciary Committee Holds Hearing on AI and Copyright—07/12/23*, YOUTUBE, at 38:30 (July 12, 2023), https://youtu.be/uoCJun7gkbA [https://perma.cc/PLL8-C77M] ("If I leave you with one message today, it is this: AI in the service of artists and creativity can be a very, very good thing. But AI that uses, or, worse yet, appropriates the work of these artists and creators and their creative expression, their name, their image, their likeness, their voice, without authorization, without consent, simply is not a good thing.").

74. SOUND RECORDINGS LISTENING SESSION, *supra* note 64, at 111.

75. *See id.* at 4.

76. *Id.* at 14.

77. *Id.* at 15.

78. *Id.* at 15–16. In June of 2024, the RIAA exercised this responsibility and announced "two copyright infringement cases based on the mass infringement of copyrighted sound recordings copied and exploited without permission by two multi-million-dollar music generation services, Suno and Udio." Press Release, RIAA, Record Companies Bring Landmark Cases for Responsible AI Against Suno and Udio in Boston and New York Federal Courts, Respectively (June 24, 2024), https://www.riaa.com/record-companies-bring-landmark-cases-for-responsible-ai-againstsuno-and-udio-in-boston-and-new-york-federal-courts-respectively/ [https://perma.cc/H79X-8XYS]. This complex litigation, however, will likely extend into late

Outside of these forums, the spectrum of opinions on the role of artificial intelligence in the music industry covers a large territory, as some find the technology charming while others find it to be wicked.[79] Some early adopters embraced the technology at its onset.[80] For example, Grimes, who earned a spot on Time's Top 100 People in AI in 2023, collaborated with an AI company to reveal software that allows creators to form songs using her voice.[81] However, this enthusiasm comes with a price, as Grimes conditions any for-profit use of this software on splitting royalties equally with her.[82] On the other end, artists call for a stricter approach, publicly condemning the programs that mimic their voices.[83] Those artists, anxiously awaiting an action to protect their works, call for immediate responses to this broad question of data ownership, strongly disapproving of the industry playing possum as it awaits regulation or guidance.[84]

2025, meaning the wait continues for further guidance about AI-generated music from the courts. Dylan Smith, *The Major Labels' Udio Infringement Suit Isn't Getting a Trial Anytime Soon—Proposed Schedule Would Take the Dispute Deep into 2025*, DIGIT. MUSIC NEWS (Aug. 20, 2024), https://www.digitalmusicnews.com/2024/08/20/udio-umg-copyright-lawsuit-schedule/ [https://perma.cc/6NT8-4Y5M].

79. *See* Savannah Fortis, *Grimes' Collaboration with Music Platform Makes 200+ AI Songs Available for Creators*, COINTELEGRAPH (Nov. 6, 2023) https://cointelegraph.com/news/grimes-collaboration-with-ai-music-platform-makes-200-songs-available-creators [https://perma.cc/Z5L2-9QDK]; Juliana Kim, *And the Award Goes to AI ft. Humans: The Grammys Outline New Rules for AI Use*, NPR (June 18, 2023), https://www.npr.org/2023/06/18/1183013852/grammys-ai-music-awards [https://perma.cc/Y27M-97EY].

80. *See* Goracke, *supra* note 8.

81. Andrew R. Chow, *Grimes*, TIME (Sept. 7, 2023, 7:00 AM) https://time.com/collection/time100-ai/6309464/grimes/ [https://perma.cc/UT8Z-427V] (reporting that Grimes endorses the possibility of the "AI-hive-mind-collective Grimes and the real Grimes face off").

82. *Id.*

83. *See* Isabela Raygoza, *Bad Bunny Slams 'Subpar' AI Soundalike That's Going Viral on TikTok*, BILLBOARD (Nov. 8, 2023), https://www.billboard.com/music/latin/bad-bunny-slams-ai-soundalike-viral-tiktok-1235466825/ [https://perma.cc/ZPH8-SVNV].

84. *See* David Henkin, *Orchestrating the Future—AI in the Music Industry*, FORBES (Dec. 5, 2023, 12:00 PM), https://www.forbes.com/sites/davidhenkin/2023/12/05/orchestrating-the-future-ai-in-the-music-industry/?sh=4c90267c4f64 [https://perma.cc/94LA-WYPD] ("Former Warner Music executive Kathryn Marshburn shares, 'Music artists are dully anxious and calling for immediate action to combat the dilution of their brand . . . .'").

As the music industry continues to wrestle with these questions, other creative industries implicated by generative artificial intelligence, like the film industry, are resolving similar questions in different manners.[85] The Writers Guild and the Alliance of Motion Picture Television Producers reached a resolution regarding many screenwriters' concerns with generative AI in the entertainment industry.[86] The new agreement allows writers to use generative AI programs on two conditions: (1) the writer cannot use the program without the company's consent, and (2) the company cannot force the writer to use generative AI when composing a script.[87] With this agreement, both sides acknowledge the benefits of consulting this kind of technology without extensively constricting their creative freedom.[88] The agreement recognizes the dangers of generative AI, allowing writers to assert that their works have been exploited in training AI software.[89] While the agreement does provide many basic pieces regarding artificial intelligence and copyright law, the agreement leaves the details of prohibitions on using copyrighted works in the training of AI software to the

85. *See, e.g.*, 2023 WGA Agreement, *supra* note 63, at 68–70 (showing collective bargaining agreements as one way industries are addressing the complexities AI brings to their practice); Ethan Shanfeld, *Scarlett Johansson Takes Legal Action Against AI App That Ripped off Her Likeness in Advertisement*, VARIETY (Nov. 1, 2023, 11:57 AM) https://variety.com/2023/digital/news/scarlett-johansson-legal-action-ai-app-ad-likeness-1235773489/ [https://perma.cc/BLC4-GZLS] (noting that the film industry is also addressing challenges posed by AI, as evidenced by Scarlett Johansson's legal action against an AI app that used her name and likeness without permission); Wes Davis, *Sarah Silverman Is Suing OpenAI and Meta for Copyright Infringement*, THE VERGE (June 9, 2023), https://www.theverge.com/2023/7/9/23788741/sarah-silverman-openai-meta-chatgpt-llama-copyright-infringement-chatbots-artificial-intelligence-ai [https://perma.cc/C5KW-WH27] (observing that other creative industries, such as publishing, are similarly grappling with AI-related issues, as demonstrated by Sarah Silverman and other authors suing OpenAI and Meta for copyright infringement over AI training datasets).

86. Jake Coyle, *In Hollywood Writer's Battle Against AI, Humans Win (For Now)*, ASSOCIATED PRESS (Sept. 27, 2023, 5:35 PM), https://apnews.com/article/hollywood-ai-strike-wga-artificial-intelligence-39ab72582c3a15f77510c9c30a45ffc8 [https://perma.cc/49B9-ANQT]; 2023 WGA Agreement, supra note 63.

87. 2023 WGA Agreement, *supra* note 63, at 70.

88. *See* Coyle, *supra* note 86.

89. 2023 WGA Agreement, *supra* note 63, at 70.

legislatures.[90] This agreement identifies an approach to the "transformative wave" of AI that has already crashed on the shore of the music industry, as the resolution addresses many of the concerns raised with respect to music and songwriting.[91]

As entertainment industries embrace AI's potential, some creators fear that the reckless supervision of artificial intelligence currently takes away the feature of consent in training these algorithms.[92] The introduction to generative AI was as turbulent as any introduction of revolutionary technology, so AI companies, such as OpenAI, are beginning to offer options that soften the blow, allowing humans to have more of a role in deciding how these algorithms work.[93] OpenAI recently announced that it allows website operators to block their IP address from being used in the training of AI models, essentially acting as an 'opt-out' feature.[94] In theory, AI developers expect this feature to offer copyright owners the ability to choose whether their works are distributed in a certain way.[95] However, a large lack of transparency remains within AI programs, as many creators might not know that their work is being used to train an AI program without their consent.[96] Ultimately, these steps in individual corners of the entertainment industry build the foundation for future copyright laws regarding the involvement of artificial intelligence in the future of entertainment.[97] However, it is integral to remember that many of these regulations function as placeholders or bare minimums with

90. Coyle, *supra* note 86.

91. *See* Henkin, *supra* note 84; 2023 WGA Agreement, *supra* note 63, at 69–70.

92. *See* SOUND RECORDINGS LISTENING SESSION, *supra* note 64, at 33, 43.

93. *See* Emilia David, *Now You Can Block OpenAI's Web Crawler*, THE VERGE (Aug. 7, 2023), https://www.theverge.com/2023/8/7/23823046/openai-data-scrape-block-ai [https://perma.cc/E6CJ-46ZU].

94. *Id.*

95. Madigan & Kim, *supra* note 72.

96. *Id.*

97. *See id.*

the expectation that the federal government will provide further guidance on how to treat generative AI in the future.[98]

C. How The New York Times Can Change AI-Generated Music

In a direct attack on generative AI, *The New York Times* ("the Times") strongly challenged Microsoft and OpenAI at the close of 2023 over the use of the newspaper's content without permission.[99] The initiation of the lawsuit followed discussions between the lawyers for OpenAI and the Times regarding the potential to extend a license to establish an authorized use of the newspaper's content.[100] As conversations soured, the commencement of legal action represented a change in the way industries are approaching generative AI: creators want their credit where it is due.[101]

In its complaint against Microsoft and OpenAI ("Times Complaint"), the Times removes the façade that disguises how generative AI appropriates content by describing how the technology has evolved to a scarier point than we once imagined.[102] The complaint describes how the endeavor to work on artificial intelligence research evolved from one "unmotivated by profit" to the secretive, for-profit mechanisms that exist for

98. Rachel Kim, *AI and Copyright Law in 2023: Federal Government Activities*, COPYRIGHT ALL. (Jan. 3, 2024), https://copyrightalliance.org/ai-copyright-federal-government-activities/ [https://perma.cc/C4QS-DSWV] ("In 2024, we can expect the Copyright Office's reports from its AI and copyright law study in addition to recommendations the Biden Administration will set forth based on the Copyright Office's findings. We can also expect Congress to remain engaged in copyright law and AI issues, with perhaps several more hearings, as other AI developments, particularly in the courts, continue to unfold.").

99. Complaint at 2, New York Times Co. v. Microsoft Corp., No. 1:23-cv-11195 (S.D.N.Y. Dec. 27, 2023) [hereinafter N.Y. Times Complaint].

100. Bobby Allyn, *'New York Times' Sues ChatGPT Creator OpenAI, Microsoft, for Copyright Infringement*, NPR (Dec. 27, 2023, 1:47 PM), https://www.npr.org/2023/12/27/1221821750/new-york-times-sues-chatgpt-openai-microsoft-for-copyright-infringement [https://perma.cc/AK6B-FLFM].

101. *See id.*

102. *See* N.Y. Times Complaint, *supra* note 99, at 17 ("GPT-3.5 and GPT-4 are both orders of magnitude more powerful than the two previous generations, yet Defendants have kept their design and training entirely a secret.").

the public.[103] As the programs have evolved to a point of accepting payment for access to different versions of AI, the Times elaborates that the models used to generate content are engaged in a behavior called "memorization."[104] When trained on copyrighted work, AI models can repeat back the information that they 'learned,' which is typically exhibited by an AI model generating a response very similar—if not exactly the same—to the content that was inputted into the model.[105] In their complaint, the Times shows an output from ChatGPT, which plagiarizes its own article almost word for word, infringing on the Times's copyright in both the input and the output side of the technology.[106] Such memorization—the storing, processing, and reproducing of copyrighted data—infringes on the rights of the authors while also impeding the ability of the newspaper to protect its intellectual property.[107] In raising these claims against OpenAI, the Times opens the door for discussions around the propriety of the payment schemes for these algorithms in all sorts of creative

103. *Id.* at 16–17; *see* Nidumolu et al., *supra* note 45; *see also OpenAI*, THE INDEX PROJECT, https://theindexproject.org/award/nominees/1170 [https://perma.cc/U7B2-Y5PK] (last visited Oct. 9, 2024) (showcasing the original mission of OpenAI to "benefit humanity as a whole, unconstrained by a need to generate financial return" by allowing its research to remain open to the public).

104. N.Y. Times Complaint, *supra* note 99, at 23; *see also* GERRIT J.J. VAN DEN BURG & CRISTOPHER K.I. WILLIAMS, ON MEMORIZATION IN PROBABILISTIC DEEP GENERATIVE MODELS 1–2 (2021) (acknowledging the increasing focus on how AI models engage in "memorization" behavior as they learn from and replicate parts of their input data).

105. *See* VAN DEN BURG & WILLIAMS, *supra* note 104, at 1–2. *But see* Blake Brittain, *New York Times Denies OpenAI's 'Hacking' Claim in Copyright Fight*, REUTERS (Mar. 12, 2024, 12:25 PM), https://www.reuters.com/legal/litigation/new-york-times-denies-openais-hacking-claim-copyright-fight-2024-03-12/ [https://perma.cc/YU4Z-TGEA] (describing the OpenAI response to the New York Times complaint, which rejects the allegation that OpenAI can be used to provide exact replicas of published articles).

106. N.Y. Times Complaint, *supra* note 99, at 30–31.

107. *Id.* at 32 ("Exhibit J provides scores of additional examples of memorization of Times Works by GPT-4 . . . . [The GPT series of LLMs] thus embodies many unauthorized copies or derivatives of Times' Works.").

industries.[108] The complaint also reflects the acceptance that the conflict with artificial intelligence is not about "whether these models exist" but rather "who will get paid."[109]

The counterarguments to the Times Complaint call for a finding of fair use by OpenAI.[110] In OpenAI's response to the lawsuit, the company defended its training of programs by claiming that "[t]raining AI models using publicly available internet materials is fair use, as supported by long-standing and widely accepted precedents. . . . [The New York Times] either instructed the model to regurgitate or cherry-picked their examples from many attempts."[111] This defense to the Times Complaint downplays the important value of the input-material for the generative AI programs, treating the materials as data sources rather than creative expression.[112] Broadly, the arguments lodged in this complaint recognize the similar concerns of generative AI in the music industry, and these arguments can aid when attempting to determine where synthetic symphonies fall in the range of copyright.[113]

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108. Cecilia Kang, *The Sleepy Copyright Office in the Middle of a High-Stakes Clash Over AI*, N.Y. TIMES (Jan. 25, 2024), https://www.nytimes.com/2024/01/25/technology/ai-copyright-office-law.html [https://perma.cc/S68N-LT3C].

109. *Id.*

110. Matt O'Brien, *ChatGPT-Maker Braces for Fight with New York Times and Authors on 'Fair Use' of Copyrighted Works*, ASSOCIATED PRESS (Jan. 10, 2024, 4:05 PM), https://apnews.com/article/openai-new-york-times-chatgpt-lawsuit-grisham-nyt-69f78c404ace42c0070fdfb9dd4caeb7 [https://perma.cc/JN38-K34B].

111. *OpenAI and Journalism*, OPENAI (Jan. 8, 2024), https://openai.com/blog/openai-and-journalism [https://perma.cc/2XDR-W4K2].

112. *See* O'Brien, *supra* note 110 (discussing how OpenAI has a deal with the Associated Press for their news archive yet chooses to discount the value of the New York Times sources); *OpenAI and Journalism*, *supra* note 111 (explaining how OpenAI uses publicly available materials under the view that it is a set of data rather than a collection of creative works, a practice which it considers to be fair use); Brittain, *supra* note 105.

113. At the time of writing, defendants filed a motion, on which no ruling has been made, to dismiss The Times' claims of contributory infringement, violations of copyright management information provisions, and state-law tort claims of misappropriation. *See* Memorandum of Law in Support of Motion to Dismiss at 8, 15, 19, New York Times Co. v. Microsoft Corp., No. 1:23-cv-11195 (S.D.N.Y. Mar. 4, 2023). Further updates reveal a discovery dispute between the parties, with OpenAI "requesting access to [New York Times] reporters' notes, interview

II. FINE TUNING COPYRIGHT LAW IN THE MUSIC INDUSTRY

Copyright law provides the strongest foundation for recording artists to protect their creative voices as artificial intelligence algorithms continue to grow.[114] At its core, copyright law intends to balance the freedom of the public to create while also protecting the creations already existing in the world.[115] Deciding where artificial intelligence fits into this balance is a complicated task, requiring that one understand the contours of the notoriously complex copyright law before deciding whether generative AI may continue in its current form.[116] Accordingly, this section first reviews the history of copyright law, identifying the underlying philosophies and purposes of protecting an author's original work. It will then explore the principles of copyright infringement along with the fair use defense, navigating the defense's journey through court precedents. Finally, it will examine copyright law's treatment of sampling and accommodation of new technologies in the music industry through the installation of licensing schemes.

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memos, and other documents integral to the creation of the articles in question." Jennifer Altman, Shani Rivaux & Macarena Ferreira Fink, *Discovery Dilemma: An Update on the Legal Battle Between The New York Times and OpenAI*, PILLSBURY WINTHROP SHAW PITTMAN LLP (July 29, 2024), https://www.pillsburylaw.com/en/news-and-insights/discovery-lawsuit-new-york-times-openai.html [https://perma.cc/Z797-FVAE]. Knowing that the lawsuit encompasses millions of articles, The Times calls these demands "'unprecedented' and 'harassing'" and argues that the copyrightability of these articles is not reliant on a reporter's private notes. *Id.* This dispute foreshadows increasing challenges that courts may face when AI conflicts with creative processes, as these courts will need to balance "the interests of copyright holders, the public interest in access to information, and the rights of technology developers to innovate freely." *Id.*

114. *See* Pamela Samuelson, *Generative AI Meets Copyright*, 381 SCIENCE 158, 158–59 (2023).

115. *See generally* Oscar Wilde, *The Soul of Man Under Socialism*, OSCAR WILDE ONLINE 11, https://www.wilde-online.info/the-soul-of-man-under-socialism-page11.html [https://perma.cc/SZ8K-TGG5] (last visited Oct. 31, 2024) (claiming that when there is too much government interference in artistic freedom, "[a]rt either entirely vanishes, or becomes stereotyped, or degenerates into a low and ignoble form of craft").

116. *See* Vincent, *supra* note 19.

A. Brief History of Copyright Law

The Constitution allows Congress to protect artists' creative liberties through the Promotion Clause, granting Congress the authority "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[117] In drafting the Promotion Clause, the Framers incorporated the economic philosophy that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."[118] Thus, the Framers aimed to facilitate a national copyright system to purge the country of the jigsaw-like structure of conflicting state laws.[119]

Historically, copyright law is tied to paradigm-shifting technologies, as copyright law owes its existence to the invention of the printing press.[120] This newfound ease of disseminating information to the public, along with a large increase in consumption of printed works, incentivized lawmakers to control the publishing market.[121] This surge led to the enactment of The Statute of Anne, the first known written copyright law that vested rights in authors for a fixed term of protection, in

117. U.S. CONST. art. I, § 8, cl. 8.

118. Mazer v. Stein, 347 U.S. 201, 219 (1954) (embracing the philosophy that providing an economic incentive to authors encourages them to create more works, thereby benefiting the public).

119. *Art.I.S.8.C.8.1 Overview of Congress's Power over Intellectual Property*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C8-1/ALDE_00013060/ [https://perma.cc/ANA7-L5CA] (last visited Oct. 25, 2024); Bonito Boats v. Thunder Craft Boats, 489 U.S. 141, 162 (1989) ("One of the fundamental purposes behind the [Promotion Clause] of the Constitution was to promote national uniformity in the realm of intellectual property.").

120. MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 3–4 (1993); *Copyright Timeline: A History of Copyright in the United States*, ASS'N. OF RSCH. LIBRS. [hereinafter *Copyright Timeline*], https://www.arl.org/copyright-timeline [https://perma.cc/WP4E-ZA5C] (last visited Oct. 25, 2024).

121. *Copyright Timeline*, *supra* note 120; ROSE, *supra* note 120, at 4.

England in 1710.[122] The principles of this statute inspired the United States' own recognition of copyright in the Copyright Law of 1790, protecting American authors' ownership in their works for a period of fourteen years.[123] Despite these initial recognitions, many changes were necessary to appropriately accommodate the needs of artists, such that the Copyright Law was amended to add more types of protectable works, extend the length of copyright protection following registration, and incorporate more exclusive rights into a copyright registration.[124] With this framework, the national program of copyrighting remained slightly dysfunctional, as the catalog of registered works did not exist in a centralized location, and authors registered their works with U.S. district courts nationwide.[125] Therefore, in 1870, Congress revised the Copyright Law of 1790 and rooted the program in the Library of Congress.[126] From here, Congress went on to establish the official U.S. Copyright Office as its own department in the Library of Congress on July 22, 1897.[127] The Copyright Office assists in the administration of copyright law by registering copyright claims, recording ownership information, providing public guidance on copyright policy, working with executive agencies, and developing regulations.[128]

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122. Statute of Anne 1710, 8 Ann., c. 19 (Gr. Brit.); *see Copyright Timeline*, *supra* note 120. For a more detailed discussion of the Statute of Anne and its lineage to American copyright law today, *see* Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427 (2010).

123. *Copyright Timeline*, *supra* note 120 (explaining that the Copyright Law of 1790 allowed an initial period of protection of fourteen years and also extended the right to a renewal period for another fourteen years after the first term expired).

124. *The 18th Century*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_18th_century.html [https://perma.cc/7U4R-FFBA] (last visited Oct. 9, 2024).

125. *History of the U.S. Copyright Office*, U.S. COPYRIGHT OFF., https://www.copyright.gov/history/copyright-exhibit/history-co [https://perma.cc/B7RQ-5XYR] (last visited Oct. 9, 2024).

126. *Id.*

127. *Id.*

128. *Overview*, U.S. COPYRIGHT OFF., https://www.copyright.gov/about/ [https://perma.cc/CG4H-FT4N] (last visited Oct. 9, 2024).

Today, the controlling authority is the Copyright Act of 1976, which provides the modern framework for the process of copyrighting.[129] Under the Copyright Act of 1976, a copyright registration provides statutory protection to "original works of authorship fixed in any tangible medium of expression."[130] Thus, to receive protection, a registrant must qualify that their creation falls within the constitutional provision of a "writing" by an "author."[131] Musical works, although audio work instead of a written, two-dimensional work, qualify as an eligible "work of authorship" to receive copyright protection.[132] Recorded musical works, moreover, consist of two separate, copyrightable elements: the musical composition and the sound recording of the track.[133] A musical composition generally refers to the melody, the score, and the lyrics compiled into one work, and the sound recording refers to the aggregation of sounds onto a particular track—what fans hear when they play the song.[134] Sound recordings were treated as

129. *1950-2000*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1950-2000.html [https://perma.cc/2TG7-M84G] (last visited Oct. 9, 2024).

130. 17 U.S.C. § 102(a); *see* § 101 (defining a work as "'fixed' in a tangible medium of expression when" it is captured in a form, either through a copy or a phonorecord, that "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration").

131. *See* U.S. CONST. art. I, § 8, cl. 8.

132. § 102(a)(2).

133. *What Musicians Should Know About Copyright*, U.S. COPYRIGHT OFF., https://www.copyright.gov/engage/musicians [https://perma.cc/TU5C-EC7C] (last visited Oct. 10, 2024).

134. *See* Mitchell v. Capitol Recs., 287 F. Supp. 3d 673, 678–79 (W.D. Ky. 2017) (quoting Corwin v. Quinonez, 858 F. Supp. 2d 903, 909 (N.D. Ohio 2012)) ("The sound recording is the aggregation of sounds captured in the recording[,] while the song or tangible medium of expression embodied in the recording is the musical composition."). To better understand how these two copyrightable elements affix to a song, think of Taylor Swift's efforts to rerecord her earlier albums after a dispute with her former record label, Big Machine Records. *See* Melissa Torres, *Copyright Law (Taylor's Version)*, WASH. J.L. TECH. & ARTS (Mar. 7, 2023), https://wjlta.com/2023/03/07/copyright-law-taylors-version/. Swift, by writing her songs on her earlier albums, retained the rights over her musical compositions, but her contract with Big Machine Records granted the label the rights to her sound recordings in perpetuity, barring her both from performing the songs live and from receiving payment for those songs. *Id.* By rerecording her old albums, Taylor Swift creates a new copyright in the new sound recordings to reclaim any income that would have otherwise gone to her former label. *Id.*

second-class citizens of copyrighted songs, as the recordings only received statutory protection in 1972.[135]

Copyright protection secures a bundle of exclusive rights to the copyright owner: (1) the right to reproduce the copyrighted work; (2) to prepare derivative works; (3) to distribute or sell copies of the registered work; (4) the right to perform the copyrighted work publicly; (5) the right to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[136] When deciding whether a new technology implicates a copyright holder's exclusive rights, courts regularly balance these rights with the interests of innovation.[137] For example, the right to prepare derivative works—such as translating a novel into another language or turning a print novel into an e-book—grants the author a monopoly over modifications made to their work of authorship, but courts halt the extension of this right when it conflicts with copyright law's underlying goal of "foster[ing] the creation and dissemination of knowledge for the public good."[138] Therefore, regulation of generative AI with respect to copyright law, knowing the historical motivations behind this area of the law, "requires balancing the legitimate interests of copyright owners to prevent misappropriations of their works that undermine incentives to create with the legitimate interest of developers of innovative technologies[.]"[139]

135. *See* H.R. Rep. No. 92-487 (1971); Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391, 391.

136. 17 U.S.C. § 106.

137. *See* Samuelson, *supra* note 114, at 159.

138. *Id.*; *see* U.S. CONST. art. I, § 8, cl. 8; Authors Guild v. HathiTrust, 755 F.3d 87, 95 (2d Cir. 2014).

139. *See* Samuelson, *supra* note 114, at 159.

B. Infringement and Fair Use

An owner of a valid copyright may hold another liable for copyright infringement upon the violation of the exclusive rights of the copyright owner provided in section 106.[140] To hold someone liable for copyright infringement, a plaintiff must demonstrate that an unauthorized copying of protected elements of a work occurred and that the infringing work is substantially similar.[141] Proof of unauthorized copying may consist of either direct evidence of copying, such as the defendant's admission, or of circumstantial evidence, such as evidence of striking similarity between the works that, "without more, . . . justif[ies] an inference of copying and . . . prove[s] improper appropriation."[142] As part of the Copyright Act of 1976, the use of a copyrighted work could be qualified as "fair use" as a defense to alleged infringement.[143] Courts consider four factors in determining whether the infringing use can qualify as fair use:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (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

140. § 501(a); *see also* § 106 (listing the exclusive rights of a copyright holder).

141. *See* Arnstein v. Porter, 154 F.2d 464, 468–69 (2d Cir. 1946).

142. *Id.* When there is no direct evidence and the copying does not qualify as strikingly similar, "a plaintiff may 'establish an inference of copying by showing (1) access to the allegedly-infringed work by the defendant(s) and (2) a substantial similarity between the two works at issue.'" Jones v. Blige, 558 F.3d 485, 490–91 (6th Cir. 2009) (quoting Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir. 1999)).

143. *See* § 107.

> upon the potential market for or value of the copyrighted work.[144]

Largely, these four factors dominate the analysis of whether a work qualifies as fair use, but courts have reiterated that "[t]he factors enumerated in [section 107 of the Copyright Act] are not meant to be exclusive[,]" such that the doctrine can be adjusted depending on the facts of the case.[145] Fair use of a copyrighted work includes using the work for purposes of "criticism, comment, news reporting, teaching . . . , scholarship or research," such that these illustrative examples use the work to "serve a manifestly different purpose from the [work] itself."[146]

During a fair use analysis, copyright law considers the work 'transformative' when the new work "supersede[s] the objects" of the original work, such that the use is so transformative in nature that it alters the original with "new expression, meaning, or message."[147] Such a finding, resulting from the inquiry of the purpose or character of the secondary use, usually indicates that the work itself is a fair use that does not infringe on the copyright holder's right to create a derivative work.[148] Only when a work crosses the line from a derivative work to a transformative work can the infringing use be qualified as fair use.[149]

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144. *Id.*

145. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).

146. § 107; Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 528 (2023) (quoting Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 37 (2d Cir. 2021)); Sag, *supra* note 32, at 304 ("If copyright law made no allowance for commentary, criticism, or parody—to give just three examples—it would inhibit reference to and reinterpretation of existing works and, thus, contradict the utilitarian purpose for which copyright was established.").

147. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994); *see* § 107.

148. *See Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 510–11, 529 ("But an overbroad concept of transformative use, one that includes any further purpose, or any different character, would narrow the copyright owner's exclusive right to create derivative works.").

149. *See* Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

The concept of a 'transformative' work emerged from *Campbell v. Acuff-Rose Music, Inc.*, in which a parody of the song "Pretty Woman" was being analyzed for copyright infringement.[150] In *Campbell*, the Court concluded that a work was transformative if the work was reaching a different market or offered a different purpose for the public to consume, which was satisfied by the fact that the accused-infringing work was a parody of the original song.[151] *Campbell* held that, while other factors are integral to the analysis, a transformative use is the strongest factor for a finding of fair use, such that "the more transformative the new work, the less will be the significance of other factors, like commercialism."[152]

Historically, courts defended copy-reliant technologies, such as those employed by generative AI, under the principle of fair use.[153] Many advocates for the inclusion of generative AI platforms in the category of fair use rely on the principles enumerated in the companion cases filed by The Authors Guild against online platforms that made print books virtually accessible.[154] In these decisions, the Second Circuit Court of Appeals held that the digitization of books consisted of a transformative use.[155] For example, in *Authors Guild v. Google, Inc.*, the act of making books searchable, along with the Google

150. *Campbell*, 510 U.S. at 579.

151. *Id.* at 584, 588, 579 ("[P]arody has an obvious claim to transformative value . . . . [I]t can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.").

152. *Id.* at 579.

153. *See, e.g.*, Sega Enters. v. Accolade, Inc., 977 F.2d 1510, 1514 (9th Cir. 1992) (approving software reverse engineering as fair use); A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630, 644–45 (4th Cir. 2009) (approving plagiarism detection software as fair use); Authors Guild v. HathiTrust, 755 F.3d 87, 100–01 (2d Cir. 2014) (approving creation of a full-text searchable database as fair use); Authors Guild v. Google, Inc., 804 F.3d 202, 225 (2d Cir. 2015) (approving the creation of a searchable online database with limited views of copyrighted books as fair use).

154. *See* Authors Guild v. HathiTrust, 755 F.3d at 100–01; Authors Guild v. Google, Inc., 804 F.3d at 225.

155. Authors Guild v. HathiTrust, 755 F.3d at 100–01; Authors Guild v. Google, Inc., 804 F.3d at 225, 229.

Books function of providing a 'snippet' image of a page of the work, generated a new purpose from the original source material, qualifying the use as transformative.[156] The function of displaying text from the underlying copyrighted work in this case supplies some groundwork for how to approach the system of generative AI.[157] In accordance with the principles mentioned in *Campbell*, *Authors Guild v. Google, Inc.* further clarified the nature of the copyright that extends to copyright owners, such that it is "a commercial right, intended to protect the ability of authors to profit from the exclusive right to merchandize [sic] their own work."[158]

The Supreme Court recently addressed the topic of transformative uses in *Andy Warhol Foundation v. Goldsmith*, 598 U.S. 508 (2023).[159] In this case, the Court looked at two portraits of the artist Prince, one which was the original photograph, taken by photographer Lynn Goldsmith, and the secondary work which, designed by famous artist Andy Warhol, created a pop-art style replica of the photo for the cover of Variety Magazine in 1984.[160] The Andy Warhol Foundation challenged the Second Circuit's determination that the "purpose and character" factor favored Goldsmith, urging the Supreme Court to qualify the artwork as fair use.[161] Here, the Court reexamined the discussion of commerciality and 'transformative uses' in *Campbell*, illuminating two main considerations to assess when looking at a work's purpose or character: (1) whether the use is commercial or nonprofit and (2) whether the use is a justified, distinct use.[162] Under this framework, a

156. Authors Guild v. Google, Inc., 804 F.3d at 208–11.

157. *See* Sag, *supra* note 32, at 308 (distinguishing generative AI as an "engine[] of new content creation").

158. Authors Guild v. Google, Inc., 804 F.3d at 214.

159. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 508 (2023).

160. *Id.* at 514–15.

161. *Id.* at 525.

162. *Id.* at 531.

secondary use is justified when "it furthers the goal of copyright . . . without diminishing the incentive to create."[163] It would be difficult to justify a secondary use that "shares the purpose of a copyrighted work" and "provide[s] 'the public with a substantial substitute for . . . the original work.'"[164] Concisely, the 'purpose and character' factor in a fair use analysis weighs towards a finding of a derivative work "[i]f an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature."[165]

Applying this construction of the purpose and character factor to the Prince portraits at issue, the Court ultimately determined that the purpose or character factor was correctly decided by the circuit court, such that the Andy Warhol Foundation's use of Goldsmith's photograph was not a fair use.[166] Here, the Court recognized that celebrity portraits are typically used "to accompany stories about the celebrity, often in magazines."[167] Both portraits were used for the same purpose of appearing alongside a story about Prince in a magazine, and the similar environments served as proof that the Andy Warhol image "shared the objectives[] of Goldsmith's photograph, even if the two were not perfect substitutes."[168] Moreover, the Andy Warhol pop-art stylization of Goldsmith's Prince portrait was commercial in nature, as both portraits were licensed to magazines for sizeable fees.[169] Since the secondary use was commercial and unjustified, the purpose and

163. *Id.*
164. *See id.* at 531–32.
165. *Id.* at 532–33.
166. *Id.* at 550.
167. *Id.* at 534.
168. *Id.* at 535–36.
169. *Id.* at 537.

character factor weighed in Goldsmith's favor, barring the Andy Warhol Foundation from using the fair use defense.[170]

C. No Free Samples: How Copyright Law Approaches Sampling in Music

Of the many available types of registerable works of authorship, musical works have a rich history in technological developments that changed the terrain of copyright law into the complex scheme that it is today.[171] One of these "creature[s] of technology in the music industry" that disrupts the traditional course of copyright law is a process known as sampling.[172] Concisely, sampling "incorporat[es] . . . a short segment of a musical recording into a new musical recording."[173] Some take a hostile approach towards the topic of sampling,

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170. *Id.* at 550. The Court also recognized the possibility that a secondary use could qualify as fair use even when borrowing heavily from the original, examining the doctrine with another famous Warhol piece: his iconic depiction of the Campbell's soup can. *See id.* at 539. In the 'Campbell's Soup Cans' example, the distinct purposes of the two uses are clear:

> The purpose of Campbell's logo is to advertise soup. Warhol's canvases do not share that purpose. Rather, the Soup Cans series uses Campbell's copyrighted work for an artistic commentary on consumerism, a purpose that is orthogonal to advertising soup. The use therefore does not supersede the objects of the advertising logo.

Id.

171. *See* Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 552–53 (2006) ("The application of copyright to music has been tested historically by the introduction of new technologies in musical performance and practice . . . . [P]rinting technology, the phonograph and player piano, radio, recorded song media[,] and digital music content have all presented challenges for copyright regimes.").

172. Perry Z. Binder, *Proof of Music Sampling in Copyright Infringement*, 26 AM. JUR. 3D *Proof of Facts* § 2 (1994).

173. Newton v. Diamond, 388 F.3d 1189, 1190 (9th Cir. 2004). Sampling must also be distinguished from 'interpolating,' which is when an existing musical work is incorporated into a new work. U.S. COPYRIGHT OFF., SAMPLING, INTERPOLATIONS, BEAT STORES AND MORE: AN INTRODUCTION FOR MUSICIANS USING PREEXISTING MUSIC 5 (Dec. 2021), https://www.copyright.gov/music-modernization/educational-materials/Sampling-Interpolations-Beat-Stores-and-More-An-Introduction-for-Musicians-Using-Preexisting.pdf. For example, "Ariana Grande's '7 Rings' interpolates Rogers and Hammerstein's 'My Favorite Things'" by incorporating the familiar melody, rhyme scheme, and cadence, but the song never directly copies the original sound recording. *Id.* An interpolation only implicates the rights of the musical work—not the sound recording—which indicates that a party seeking to interpolate a melody without directly copying the original sound recording must only acquire a license from the musical work's copyright owner. *Id.*

equating it to theft.[174] However, this practice embodies the longstanding principle in intellectual property law that creative expression is intrinsically connected to a common ground.[175]

The conceptual roots of sampling date back to a period of British colonial rule in Jamaica in the 1950s and early 1960s.[176] Then, Jamaicans reimagined American southern soul songs, adding in reggae rhythms and speaking over the track in patois,[177] out of a rebellion against the state-owned radio that favored American and British pop music.[178] The process arrived in America in the early 1970s, where DJs (disc jockeys) mixed pop songs with funk beats, and MCs (masters of ceremonies) led and encouraged the crowd's response.[179] There, the process of digital sampling blossomed as technologies—such as tape replay keyboards and sampling synthesizers—facilitated the process of sampling both in recording booths and clubs.[180] The

174. Judge Duffy famously endorsed the comparison between sampling and theft by citing the Ten Commandments: "'Thou shalt not steal.' . . . [Sampling] violates not only the Seventh Commandment, but also the copyright laws of this country." Grand Upright Music Ltd. v. Warner Bros. Recs., Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

175. White v. Samsung Elecs. America, Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, C.J., dissenting) ("Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before."); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1556 (1993) ("Just as land is necessary for farmers to bring forth fruit (in Locke's imagery), a common of previously-created intangibles is necessary for creators to bring forth new works of the imagination.").

176. For a more detailed history of sampling, *see* Henry Self, *Digital Sampling: A Cultural Perspective*, 9 UCLA ENT. L. REV. 347, 348–51 (2002).

177. Patois (or Patwa) is "a colorful, descriptive, and emphatic creole dialect that has been shaped by [Jamaica's] African, Spanish, French, Portuguese, and English colonial heritage." *Jamaican Patois*, VISIT JAMAICA, https://www.visitjamaica.com/discover-jamaica/people-heritage/language/ [https://perma.cc/AFT4-79CG] (last visited Oct. 27, 2024).

178. Self, *supra* note 176, at 348, 352 ("[E]valuating sampling in a scholarly framework of Western artistic movements and ideals fails to recognize it for what it originally was: a folk tradition that emerged from the shared experiences of economically disadvantaged minorities.").

179. *Id.* at 349–50.

180. *The Sampler—A Guide to Sampling in Music*, SOUNDTRAP (Mar. 29, 2023), https://www.soundtrap.com/content/blog/sampler-guide-to-sampling [https://perma.cc/65T3-EM3D].

techniques available through these technologies range from building new drum patterns to loop sampling, and "[s]ampled sounds run the gamut from highly recognizable to obscure to undecipherable fragments of sound."[181] Today, the process is prominent in hip hop and electronic music,[182] and many choose to sample songs that carry an additional cultural significance.[183]

Sampling qualifies as a class of infringement even though a small amount of "fragmented literal similarity" exists.[184] Absent permission from the copyright holder, circuit courts are split on whether sampling should be viewed as a trivial inclusion to a song's composition or as blatant theft, no matter the size of the sample.[185] Generally, to legally reproduce and distribute a song that includes a sample, a party must obtain a license to reproduce and distribute both the musical composition and the sound recording involved.[186] The copyright

181. Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music Is Scratching More than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 858 (2011); *The Sampler—A Guide to Sampling in Music*, *supra* note 180.

182. *The Sampler—A Guide to Sampling in Music*, *supra* note 180.

183. *See* Self, *supra* note 176, at 353 ("By sampling portions of classic (and obscure) jazz and funk recordings, black artists in some ways reclaim a part of their collective African-American identity from the white establishment that appropriated and exploited it years earlier. In this sense, it may be said that some artists are simply reclaiming cultural property that was effectively stolen in the first place.").

184. *See* Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2003). Fragmented literal similarity refers to a kind of copying in which a plaintiff's work is reproduced "exactly or near exactly[] without appropriating the work's overall essence or structure." *Id.* A case of fragmented literal similarity qualifies as infringement when the 'heart' of the work is appropriated, such that "so much is taken[] that the value of the original is sensibly diminished." Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

185. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005) ("[S]ampling is never accidental . . . . When you sample a sound recording[,] you know you are taking another's work product."); VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 886 (9th Cir. 2016) ("Because we conclude that Congress intended to maintain the 'de minimis' exception for copyrights to sound recordings, we take the unusual step of creating a circuit split by disagreeing with the Sixth Circuit's contrary holding in *Bridgeport*."); *see also* Tyler B. Burns, Note, *And They Sayin' It's Because of the Internet: Applying the De Minimis Exception to Digital Sound Sampling in the Wake of* VMG Salsoul, LLC v. Ciccone, 10 DREXEL L. REV. 445, 475–83 (analyzing the circuit split left by *Bridgeport* and *VMG Salsoul*).

186. 17 U.S.C. §§ 114–115, 201.

created by a song creates a complicated form of ownership, and as a result, negotiating a license may require a songwriter to contract away most of his or her rights to simply receive permission.[187] However, artists' desires for attribution and validation encourage the songwriter to license their rights for further use.[188]

The Copyright Act assembles a licensing system that balances competing demands in the music industry.[189] With respect to sound recordings, the Copyright Act only protects the copyright in a sound recording against direct duplication of the actual sounds, such that an imitation of the sound recording is not protected under copyright law.[190] Platforms can directly make deals with major record labels to play the sound recordings, as making deals with the record company is less cumbersome than individually contacting every artist.[191] Regarding the other copyrightable element of songs, licensing of musical works triggers a statutorily created mechanical license.[192] In order to trigger the statutory license in Section 115

187. *See* Ben Sisario, *'7 Rings' Is a Hit for Ariana Grande, and a Knockout for Rodgers and Hammerstein*, N.Y. TIMES (Mar. 19, 2019), https://www.nytimes.com/2019/03/19/business/media/ariana-grande-7-rings-rodgers-hammerstein.html [https://perma.cc/VL4B-HXG9] (discussing how, despite '7 Rings' crediting ten songwriters, Rodgers and Hammerstein "control 90 percent of the songwriting royalties, a remarkable split that reflects the value of evergreen song catalogs, and of the negotiating leverage their owners have when pop stars come seeking permission").

188. *See* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1791 (2012) ("[C]reators are willing to reduce significantly the amount of money they are willing to accept to license their intellectual property rights."); Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 535 (2023) (noting that licenses often allow artists to make a living, such that "[t]hey provide an economic incentive to create original works, which is the goal of copyright").

189. *See* §§ 114–115.

190. § 114(b).

191. *See* Michelle Castillo, *Spotify IPO Filing Reveals How Insanely Complicated It Is to License Music Rights*, CNBC, https://www.cnbc.com/2018/02/28/how-spotify-licenses-and-pays-for-music-rights.html [https://perma.cc/897S-4LFD] (Apr. 27, 2018, 12:42 PM) ("Spotify has deals with the big three record labels—Universal Music Group, Sony Music Entertainment Group, and Warner Music Group.").

192. § 115. Any license agreement negotiated voluntarily is upheld regardless of the judgment of the Copyright Royalty Judges. § 115(c)(2)(A).

of the Copyright Act, the work must satisfy two conditions: (1) the work must be a nondramatic musical work,[193] and (2) the original copyright owner must have previously permitted phonorecords of the musical work to be distributed in the United States.[194] Once triggered, anyone can obtain this license to make and distribute phonorecords of the musical work to the public.[195] Upon the establishment of a license, the licensee must pay a royalty fee to the licensor at a statutorily set rate, provided that the parties have not contracted to the contrary.[196] The rate is set by a board of Copyright Royalty Judges, who determine reasonable default rates for those wishing to secure a compulsory license.[197]

To make this course of events more digestible for songwriters who are not fluent in copyright jargon, many songwriters contract with a music publisher,[198] granting the publisher ownership over the copyright in exchange for royalties.[199] The publisher promotes the songwriter's work by pitching the work to music executives, financing demo recordings, and suggesting songs to be used in television shows or commercials.[200] The publisher also negotiates with third-party agencies like the

193. A 'nondramatic' musical work refers to any "original work of authorship consisting of music . . . and any accompanying lyrics not created for use in a motion picture or dramatic work." U.S. COPYRIGHT OFF., CIRCULAR 73: COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS 1 (2018), https://www.copyright.gov/circs/circ73.pdf.

194. § 115(a)(1)(A).

195. *Id.*

196. § 115(c)(1).

197. § 115(c)(1)(F). The current schedule of reasonable rates provides that, for physical phonorecords and permanent music downloads, the rate is set at the larger of either 12.4 cents or 2.38 cents per minute of playing time for all works fixed after December 12, 2023. U.S. COPYRIGHT OFF., MECHANICAL LICENSE ROYALTY RATES (2024), https://copyright.gov/licensing/m200a.pdf.

198. "A music publisher owns or administers musical works written by songwriters," usually controlling a large catalogue of artists. *FAQs*, HARRY FOX AGENCY [hereinafter HFA FAQs], https://www.harryfox.com/faq [https://perma.cc/7TZ2-7DMW] (last visited Oct. 9, 2024).

199. *See* U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS 19 (2d ed. 2015).

200. HFA FAQs, *supra* note 198.

Harry Fox Agency ("HFA").[201] Through agencies like the HFA, licensees can obtain a license voluntarily instead of paying the statutory rate to the composer directly because the agency possesses a rich catalog of connections with artists and record labels in the music industry.[202]

III. THE SNOOPY PROBLEM: EVIDENCE OF COPYING WITH AI-GENERATED MUSIC

One of music's key attractions is the ability of listeners to gather around and share the experience together, whether they are gathered to support a specific artist or specific genre. When using generative AI to create music, many users are interested in replicating the sounds and voices that they already know.[203] Users seeking to hear a new Taylor Swift song, written in her style, about whatever topic they desire are likely to provoke generative AI to infringe on Swift's copyrighted works in a phenomenon called "the Snoopy problem."[204]

As referenced in *The New York Times* complaint, a major point of speculation is the power of "memorization" within generative AI programs.[205] This capacity of generative AI is embodied in the Snoopy problem, which provides context for why an AI output might look exactly like its input when the work consists of conceptually strong components.[206] The problem, tested on copyrightable characters, illustrates that prompting Midjourney, an AI image generator, to create an image of "Snoopy laying on red doghouse with Christmas

201. *History of HFA*, HARRY FOX AGENCY, https://www.harryfox.com/history [https://perma.cc/599J-WFTC] (last visited Oct. 9, 2024).

202. *See id.* ("HFA represents nearly 50,000 affiliated publishers and licenses more than 2,500 record labels.").

203. *See* Goracke, *supra* note 8.

204. Sag, *supra* note 32, at 327–28.

205. N.Y. Times Complaint, *supra* note 99, at 23; VAN DEN BURG & WILLIAMS, *supra* note 104, at 1–2.

206. Sag, *supra* note 32, at 327–28.

lights on it comic" generates an infringing image of the famous beagle.[207] The problem also elicited infringing photos from prompts not based on copyrightable characters, as the same phenomenon occurs for one attempting to mimic a Banksy-style image of a young girl and a heart-shaped balloon.[208] In part, this showcases the strength of the copyrightable character,[209] but it is worth considering how this demonstrates memorization. Reflecting the underlying framework of the AI algorithm, the problem demonstrates that "memorization is more likely if a text description is closely associated with a particular image over and over again."[210] The stronger the request and the more detailed the prompt, the more likely the generative AI will create a song using samples of Taylor Swift's voice.[211]

While the most vivid examples of the Snoopy problem come from the infringing pictorial works, a complaint filed against the AI platform Anthropic replicated the scenario with the infringing creation of copyrighted lyrics to protected songs.[212] At some points, the algorithm was prompted to recite the lyrics of specific songs to which it did not have the licenses, almost perfectly reciting "Roar" by Katy Perry and "I Will Survive" by Gloria Gaynor.[213] In other situations, the AI was prompted to "[w]rite a song about moving from Philadelphia to Bel-Air," which subsequently responded with Will Smith's famous theme song for "Fresh Prince of Bel-Air."[214] As long as these algorithms are trained on copyrighted works

207. *Id.* at 330–31.

208. *Id.* at 335.

209. Characters can be granted an extremely broad copyright protection if the character is reasonably detailed and distinct. Gaiman v. McFarlane, 360 F.3d 644, 660–61 (7th Cir. 2004).

210. Sag, *supra* note 32, at 334.

211. *See id.*

212. Complaint & Demand for Jury Trial at 20, Concord Music Grp. v. Anthropic, No. 3:23-cv-01092 (M.D. Tenn. Oct. 18, 2023), ECF No. 1.

213. *Id.* at 21–25.

214. *Id.* at 33–35.

with strongly identifiable features, such as a move from Philadelphia to Bel-Air, the algorithms, engaged in the process of memorization, infringe on the copyrights of these musical works.[215] Without any sort of licensing agreement or availability of the artist to offer permission, these products plainly allow any individual to prompt the program to produce even slightly similar, yet still infringing, copies of the work for profit.[216]

IV. THE PERFECT HARMONY FOR AI MUSIC: SOLVING INFRINGEMENT WITH LICENSING

At this point, generative AI rests in a cavity of copyright law.[217] States can enact statutes protecting an artist's right to publicity in their own voice,[218] but a federal response is necessary to prevent this black hole in copyright law from swallowing vulnerable artists. As many scholars jump to conclude that this technology, while infringing, would qualify as a fair use,[219] that defense cannot stand, especially with respect to the music industry. The answer to generative AI in music is not fair use; the best option, one which accommodates for artists'

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215. *See id.*

216. *See id.* at 42.

217. *See* Benjamin L.W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 COLUM. J.L. & ARTS 45, 49 (2017).

218. *See, e.g.*, Rebecca Rosman, *Tennessee Becomes the First State to Protect Musicians and Other Artists Against AI*, NPR (Mar. 22, 2024), https://www.npr.org/2024/03/22/1240114159/tennessee-protect-musicians-artists-ai [https://perma.cc/22X3-DEZN] (discussing Tennessee's enactment of the ELVIS Act to establish a right of publicity in an artist's voice, which is a different scope of authority than federal copyright law).

219. *See, e.g.*, Sag, *supra* note 32, at 305 ("[T]he rationale for allowing for-profit and academic researchers to derive valuable data from other people's copyrighted works is a necessary implication of the fundamental distinction between protectable original expression and unprotectable facts, ideas, abstractions, and functional elements."); Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743, 750 (recognizing that "[c]opyright law should permit copying of works for non-expressive purposes" such as machine learning, provided that the purpose is not to copy the plaintiff's copyrightable expression in the work). *But see* Joseph Will, Note, *Rage Against the Machine: Copyright Infringment in AI-Generated Music*, 31 J. INTELL. PROP. L. 378, 396–99 (2024) (arguing that a fair use defense is likely not to be accepted by the courts because "most instances of AI will likely struggle to satisfy key fair use factors").

interests in creative freedom as well as appropriately acknowledging copyright ownership, is to create a statutory licensing provision for the use of copyrighted works in creating generative AI programs. More directly, the solution to this ambiguity left by the current operation of copyright law and generative AI is two-fold: (1) the current method of generative AI is infringing on musicians' copyrights and is not a fair use under the Copyright Act of 1976, and (2) the Copyright Act of 1976 should be amended to adopt a compulsory license that allows artists to continue to work with this technology in a way that benefits artists.

A. Generative AI Currently Infringes on Copyright

Courts should find that, under the Copyright Act of 1976, owners of a copyright in a song retain a claim for copyright infringement against generative AI programs.[220] While some plaintiffs might have the opportunity to know the scope of the training data used for an infringing generative AI program, others might not have access to such direct evidence of copying and may have to turn to circumstantial evidence. A plaintiff drawing on the Snoopy problem[221] would have a strong case, considering the ample amount of proof that the similarities between original songs and AI-generated songs are so striking that they, without more, justify an inference of copying.[222] For example, generative AI's direct duplication of Will

220. *See* 17 U.S.C. § 501.

221. *See* discussion *supra* Part III; *see also* Lee et al., *supra* note 27, at 147 ("Whether an output looks like Snoopy or like a generic beagle depends on what images were collected in a dataset, which model architecture and training algorithms are used, how trained models are fine-tuned and aligned, how models are embedded in deployed services, what the user prompts with, etc.").

222. *See* discussion *supra* Part III (exploring the evidence of strong similarities between the expressions of human authored songs and the generated expressions of AI songs).

Smith's "Fresh Prince of Bel Air"[223] supplies a striking similarity to the original, copyrighted work, and this similarity is so strong that a reasonable juror should conclude that direct copying occurred when developing the AI program.[224] Furthermore, the process of memorization by generative AI, whether it is an abnormality in the system or not, is no different than if the infringer was a human; intent of copying has never been a requirement for copyright infringement, as the courts have previously held artists liable even if they did not consciously attempt to copy a specific song.[225] In the words of Judge Learned Hand:

> Everything registers somewhere in our memories, and no one can tell what may evoke it . . . . Once it appears that another has in fact used the copyright as the source of this production, he has invaded the author's rights. It is no excuse that in so doing his memory has played him a trick.[226]

Artificial intelligence similarly walks this line between inspiration and imitation, and if the courts have construed the meaning of infringement to hold humans liable for toeing this line, there should not be an excuse for artificial intelligence.

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223. *See supra* notes 211–12 and accompanying text; Complaint and Demand for Jury Trial at 33–35, Concord Music Grp. v. Anthropic, No. 3:23-cv-01092 (M.D. Tenn. Oct. 18, 2023), ECF No. 1.

224. *Cf.* Price v. Fox Ent. Grp., Inc., 499 F. Supp. 2d 382, 387–88 (S.D.N.Y. 2007) (providing that an inference of copying cannot be justified when two movies contain substantial differences in their plots, precluding a possibility of striking similarity).

225. ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir. 1983); *see also* White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 11 (1908) ("Music, it is argued, is intended for the ear as writing is for the eye.").

226. Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147–48 (S.D.N.Y. 1924) (Hand, J.).

At this point, many turn to fair use as the justification for training datasets on copyrighted works and enabling generation with this material.[227] Under *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023), applying the first fair use factor—the purpose or character of the use—must balance the degree of difference between the underlying use and the secondary use against the commercial nature of these uses.[228] While the underlying purpose of releasing songs may be arguable, courts have accepted a secondary use to be commercial "by a showing that repeated and exploitative unauthorized copies . . . were made to save the expense of purchasing authorized copies."[229] In the context of AI-generated music, a very similar situation occurs: allowing a listener to bypass the process of purchasing an album or streaming a song diverts consumption of the original copyright and suggests the generated copy as an alternative.[230] By indiscriminately scraping songs to use as data in creating a generative AI program, exploiting music for such an unauthorized purpose should qualify generative AI, in this context, as a commercial use. Furthermore, like the solicitation of the portraits for a magazine, the process of inputting copyrighted material to allow users to generate content that would directly compete with that material similarly allows the user to create a substantial

227. *See, e.g.*, Sag, *supra* note 32, at 309 (arguing that generative AI falls within the scope of fair use "because what matters is not whether a copy-reliant technology is used to create something equivalent to human expression; what matters is whether the original expression of the authors of works in the training data is communicated to a new public"); Lemley & Casey, *supra* note 219, at 750 ("When the defendant copies a work for reasons other than to have access to the protectable expression in that work, fair use should consider under both factors one and two whether the purpose of the defendant's copying was to appropriate the plaintiffs expression or just the ideas.").

228. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 532 (2023).

229. A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001); *see* Sega Enters. Ltd. v. MAPHIA, 857 F. Supp. 679, 687 (N.D. Cal. 1994) (holding the unauthorized copying of video game files, to avoid having to purchase the video game cartridges from the copyright owner, was a commercial purpose).

230. *See Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 535–36.

substitute for the original work.[231] Such a similar use cannot unbalance the weight of the commercial purpose of the use, and to avoid an improper attribution of economic incentives and copyright ownership rights, this first factor should heavily weigh against a finding of fair use.

Next, the analysis quickly turns to the factors that were not addressed in *Andy Warhol Foundation v. Goldsmith*.[232] For the second factor, regarding the nature of the copyrighted work, courts consider the expressive value of the copied work, such that uses that contain more expression and subjective meaning are less likely to qualify as fair use.[233] To this factor, there is little to dispute that music, a considerably raw, emotional art form, contains sufficient expressive value to weigh against a finding of fair use.[234] The analysis of the third factor, the "amount and substantiality of the portion used,"[235] is heavily aided by the treatment of sampling: even when the copied portion is not a large portion of the underlying work, the degree to which users can identify the underlying features might sway this factor against a finding of fair use.[236] Since this inquiry can be considerably fact-dependent, it is best to consider this factor neutral for the purposes of this broad analysis. Finally, the fourth factor—effect on the market—assesses the

231. *See id.*; *see also* Will, *supra* note 219, at 396–97 (arguing that the first fair use factor should weigh against a finding of fair use "because the final product would still be music with the potential to supplant the original in the marketplace").

232. The Second Circuit Court of Appeals found that all four fair use factors favored Goldsmith, and the Andy Warhol Foundation only challenged the finding as to the first factor. 598 U.S. at 523–25.

233. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994) ("This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."); *see, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363–64 (1991) (finding that an alphabetical phonebook is not creative enough to be considered an original work and does not warrant copyright protection).

234. *See* ENGAGING WITH MUSIC, *supra* note 1, at 12–14; Cimons, *supra* note 2.

235. 17 U.S.C. § 107(3).

236. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005); *see also* Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2004).

adverse impact that, if accepted as a fair use, the conduct would have on the potential market.[237] If courts were to authorize fair use in this circumstance, "[h]uman creators, in turn, might not derive any incentives from copyright law if robotic rivals undercut their earning potential," as musicians would feel powerless in an environment that encourages rampant copying of something so personal to the individual artist.[238] As a whole, this analysis, heavily swayed by the absence of a transformative purpose, should indicate that the assembly of a generative AI program, completed by training algorithms on copyrighted works for the purpose of generating expressive works, is not fair use.

Opponents qualify that generative AI should be viewed as purely extracting data and that this fair use heavily resembles the *Authors Guild* cases.[239] However, unlike *Authors Guild v. Google, Inc.*, where the copying made otherwise unavailable data accessible,[240] AI music generators copy widely available songs to interpret music and to create new, similar content.[241] Since the purpose of generative AI allows this technology to dip into the realm of enabling expressive uses, rather than simply disseminating information about the expressions contained in a work, it would be inappropriate to form a basis for fair use around a case that centered on copying data. In other words, the technology is copying expressions, not objective data points, and therefore, the fair use defense is improper.

237. *See Campbell*, 510 U.S. at 590; *see also* Sony Corp. Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (holding that, in cases of mere duplication of copyrighted works, "[i]f the intended use is for commercial gain . . . likelihood [of future harm] may be presumed").

238. *See* Sobel, *supra* note 217, at 89.

239. *See* Sag, *supra* note 32, at 303–07.

240. Authors Guild v. Google, Inc., 804 F.3d 202, 215 (2d Cir. 2015).

241. *See, e.g.*, Goracke, *supra* note 8 ("Generative AI can be deployed in a number of ways to create (or help create) a new piece of music. For instance, the technology could be used to study or 'scrape' millions of input music points to generate a new composition.").

In many ways, the fair use defense is intended to act as a "safety valve to prevent the powerful from smothering the expressive rights of the less powerful."[242] The application of the doctrine of fair use to generative AI does not align with this goal.[243] Generative AI, trained on material involving human expression, promises a unique value to our culture, but in a realm of copyright that applies fair use to generative AI, this value would be consolidated by larger tech giants and removed from the artists.[244] As a result, the incentive to create more works rests with the technology, not with the human artists. Many artists could be less inclined to create music out of a fear that their work will be endlessly appropriated.

Artists should retain a plausible infringement claim against generative AI programs by rebutting the fair use defenses. This outcome, however, leaves an unsatisfying and undesirable result.[245] If held liable for infringement, generative AI programs, holding a vast catalog of creative works in their capacity, would be liable for a crippling award of damages.[246] While providing artists with a healthy amount of compensation, this result can potentially release a "chilling effect" on the development of artificial intelligence altogether, obstructing the progress of our culture's cumulation of artistic works and scientific discoveries.[247] The threat of copyright infringement, in this scenario, carries considerable weight, and it would be harmful to artists to halt generative AI completely under the principles of copyright law. As a result, legislators should direct their

242. *See* Sobel, *supra* note 217, at 88.

243. *Id.* at 89 ("Commercial machine learning, trained on expressive media, promises tremendous social value. But it is not the sort of value that fair use exists to foster.").

244. *Id.*

245. *See id.* at 80.

246. *See* 17 U.S.C. § 504(c)(1)–(2) (indicating that statutory damages can be as little as $750 for each infringing use and as much as $150,000 per work, which would mean a damages award of millions of dollars for all songs in a generative AI training dataset).

247. Sobel, *supra* note 217, at 80.

attention toward a statutory solution in the realm of copyright that makes the fair use defense unavailable to generative AI companies.

B. Licensing Balances Creative Freedom with Copyright Ownership

To allow generative AI to be used in a creative capacity, a compulsory license is needed to require generative AI programs to pay a fee to the original owners of the copyright in a phonorecord based on the profit accrued from subscriptions or distributions of AI-generated songs. A statutory license would be appropriate, as it follows the lead that Congress left with the mechanical license available in Section 115.[248] It would also align with the practices in place for music sampling, such that direct duplication of a sound recording in this process requires a party to obtain permission from the copyright owner prior to dissemination of works that reproduce that sound recording.[249] If the process of licensing is so passionately accepted in the music industry for a moderately analogous practice, such as sampling, then licensing should similarly be accepted for generative AI.

The license should also permit artists to opt out or negotiate their own agreement voluntarily, but in the absence of selecting either of those options, the compulsory license should still apply as a default rule. The mechanical license provided by Section 115 similarly recognizes the artist's right to voluntarily contract,[250] and providing the same recognition here could appropriately afford artists their own agency. Applying the same principles allows artists to negotiate their own rates, which might make the difference in allowing a secondary user

248. 17 U.S.C. § 115(d)(3).
249. § 114.
250. § 115(c)(2)(A).

to secure permission at all.[251] Furthermore, an opt-out provision would allow an owner of a copyright in a phonorecord to decline to grant permission to generative AI programs. By including such a provision, legislators would recognize the artist's economic right that vests in a copyrighted work.

In attempting to generate a statute for generative AI, it is important to remember that there are still more unknown variables with this complex technology, and legislators must prudently examine generative AI before prematurely making a broad rule.[252] Keeping in mind the flexibility that is required when drafting a statute, a baseline for an amendment in the Copyright Act that addresses these components could be written accordingly:

> (a) A person may, by complying with the provisions of this section, obtain a compulsory license to use phonorecords in the creation of a generative AI program. A person may obtain a license if phonorecords of such nondramatic musical works have previously been distributed to the public in the United States under the authority of the copyright owner of the work, including by means of digital phonorecord delivery.
>
> (b) For every phonorecord distributed under this license, a reasonable royalty, set by the Copyright Royalty Judges, shall be proscribed. License agreements for royalties voluntarily negotiated between creators of generative AI

251. *See, e.g.*, Sisario, *supra* note 187 (discussing the songwriting royalties for Ariana Grande's "7 Rings").

252. *See* Lee et al., *supra* note 27, at 146–48 (discussing crucial lessons that policymakers must keep in mind when attempting to articulate a rule about generative AI and copyright).

> programs and owners of copyright in phonorecords shall be given effect in lieu of any determination by the Copyright Royalty Judges.
>
> (c) The distribution of a phonorecord created by a generative AI program, without securing a license or without paying royalties, under this title is actionable as an act of infringement under section 501.
>
> (d) The owner of a copyright in a phonorecord, if wishing to deny generative AI programs permission, retains the right to object to the use of the phonorecord. Absent any notice of intent to object, the license in this section applies.

This drafted statute accommodates for the several interests at issue with the training of generative AI on copyrighted works: attributing credit to copyright owners for appropriation of their works in a new technology, recognizing the artist's right to contract their own agreement, and designating an appropriate fee to compensate the copyright owner. By attributing the question of a reasonable fee to the Copyright Royalty Judges, this statute places the responsibility in the hands of those who are familiar with determining royalty fees.[253]

Furthermore, the similar construction of this provision to the compulsory license in Section 115 may aid artists in understanding the application, as Congress could similarly designate a collective organization or agency to oversee the

253. *See supra* text accompanying notes 196–97.

allocation of royalties in the music industry.[254] Fitting the economic incentive of licensing one's work for an infinite potential of creative uses to the scheme of generative AI appeals to the artists who identify strongly with their art, recognizing their dignitary efforts as well as the fruits of their labor. Granting the artists the choice, a choice that many artists have already accepted with open arms, provides artists with the incentive to join generative AI technologies and experiment with these new creative boundaries.[255] The marginal reward is greater than any sort of deprivation of their agency over their creations, and the absence of any sort of scheme grossly misconstrues the intention of copyright law to promote the progress of arts and sciences.[256] For these reasons, a compulsory license best serves the needs of copyright owners that are currently stranded.

CONCLUSION

First impressions are important, and when generative AI first showed its capacity to emulate human expression, it left the impression that a dystopian, soulless future is swiftly approaching. But with a bit of nuance, it becomes clear that AI is not a divide but, rather, a bridge. This bridge connects starry-eyed artists to resources that were previously inaccessible, and in a hopelessly romantic fashion, these artists fatefully cross paths with the voices of their biggest inspirations. Now, idealistic members of the public create incredibly vivid, intentional works of art with these AI algorithms. While this bridge serves an important purpose, such a structure must rest on a strong foundation, and the current state of generative AI crumbles on theories of copyright infringement. If the public is intended to

254. § 115(d).

255. *See* Veltman, *supra* note 11.

256. *See* U.S. CONST. art. I, § 8, cl. 8.

innovate and engage in the promotion of creative ideas, copyright law requires substantial consideration to make sure that it enables fruitful creation rather than a grand theft of expression.

Creations that appropriate and copy others' work without permission cannot root their existence in theories of fair use when such a position would not be supported under recent precedent. This Note has shown instances of blatant infringement when training generative AI programs; as mentioned by *The New York Times*, such a position undermines the ability of authors to maintain their own agency within the creative process. With the introduction of a licensing scheme for this new technology, legislation can provide artists with a remedy before more platforms offer unique casts of AI algorithms, ones that we still cannot comprehend. Creating this new technology in no way should deter artists from wanting to be engaged in new developments with the art form. Instead, providing a mechanism to work with the programs rather than against them will allow copyright law to fulfill its constitutionally granted purpose.