Library of Congress
Copyright Office
Docket No. 2023-6
Notice of Inquiry and Request for Comments: Artificial Intelligence and Copyright

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in their personal capacity
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*Disclaimer: Institution is listed for purposes of affiliation only. The views, positions, and arguments articulated herein are personal to the author and are neither representative of nor on behalf of any institution with which the author is affiliated.

      I am responding in my personal capacity to the Question indicated below and each question is addressed separately.

      Question <u>33</u>: With respect to sound recordings, how does section 114(b) of the Copyright Act relate to state law, such as state right of publicity laws? Does this issue require legislative attention in the context of generative AI?

      Response:

I.   Introduction

    Section 114(b) requires legislative attention to address the impact of generative AI on sound recordings in the digital age. The practice of training generative AI models on large quantities of raw audio allows these models to account for subtleties in recorded music that would be difficult to detect in limited symbolic training material.[2] Therefore, when trained on ample raw audio, the AI model can generate music that resembles the distinct characteristics of whichever artist(s)

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[2] *See generally* Eric Sunray, *Sounds of Science: Copyright Infringement in AI Music Generator Outputs*, 29 Cath. U. J. L. & Tech. 185, 191-192 (2021).

and/or genre(s) the user chooses.[3] The imitation/simulation "loophole" in §114(b) coupled with the mimicking nature of generative AI leaves many artists vulnerable to the commercial exploitation of their musical style and flow.[4] State right of publicity laws may provide recourse to those who would otherwise fall prey to generative AI. Like New York's recognized right of publicity, which defines what constitutes a "digital replica", section 114(b) should incorporate a digital replica definition that is broad enough to encompass generative AI sound recordings.[5]

II.   17 U.S.C. § 114(b) – Scope of Exclusive Rights in Sound Recordings

Section 114 delineates the exclusive rights of copyright owners in sound recordings, the limitations on these rights, and an exemption for sound recordings used in educational programs distributed through public broadcasting entities.[6] Under subsection (b), the copyright owners of sound recordings have the following exclusive rights: (1) the right to duplicate the sound recording in the form of copies that directly or indirectly capture the actual sounds fixed in the recordings; and (2) the right to prepare derivative works in which the actual sounds fixed in the sound recording are rearranged, remixed, or altered in sequence or quality.[7] However, these exclusive rights under do not extend to the creation or duplication of another sound recording that is wholly comprised of an independent fixation of other sounds, even if those sounds imitate or simulate those in the copyrighted sound recording.[8] Additionally, these exclusive rights do not apply to sound recordings included in educational television and radio programs as defined in section 397

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[3] *Id.*
[4] *See* 17 U.S.C. § 114(b) (noting that reproduction and derivative works rights "do not extend to the making or duplication of another sound recording...even though such sounds imitate or simulate those in the copyrighted sound recording.").
[5] *See* N.Y. Civ. Rights Law § 50-f (Consol. 2023).
[6] 17 U.S.C. § 114.
[7] § 114(b).
[8] *Id.*; *see also* 17 U.S.C. § 106(1),(2).

of title 47.[9] However, this exemption is subject to the condition that copies or phonorecords of these programs are not commercially distributed by or through public broadcasting entities to the general public.[10]

III.   New York – Right of Publicity

The New York right of publicity establishes rights and protections for the use of a deceased personality's attributes, digital replicas, and related rights in commercial and creative contexts, while also providing exemptions and limitations to such rights.[11] The statute emphasizes property rights, registration, and a time limitation for taking legal action.[12] The statute's definition of a "digital replica" accounts for modern developments within AI technology.

> [A] *digital replica* means a newly created, original, computer-generated, electronic performance by an individual in a separate and newly created, original expressive sound recording or audiovisual work in which the individual did not actually perform, that is so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual.[13]

A digital replica does not include the electronic reproduction, computer generated, or other digital remastering of an expressive sound recording or audiovisual work consisting of an individual's original or recorded performance.[14] Like § 114(b), the New York right of publicity limits what constitutes a "digital replica" from applying to the creation or duplication of another sound recording that is wholly comprised of an independent fixation of other sounds, even if those sounds imitate or simulate those in the copyrighted sound recording.[15]

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[9] § 114(b).
[10] *Id.*
[11] N.Y. Civ. Rights Law § 50-f (Consol. 2023).
[12] *Id.*
[13] *Id.* at (1)(c).
[14] *Id.*
[15] *Id.*

IV.   New York's "Digital Replica" Definition as Starting Point

Incorporating New York's "digital replica" definition into the current copyright regime lends credence to the idea that state right of publicity laws can be used to address the AI related gaps current copyright law fails cover. New York's definition of "digital replica" is broad and flexible enough to encompass the capabilities of generative AI. The definition explicitly mentions that a digital replica is "newly created" and "original."[16] Generative AI systems can create original, realistic renditions in sound recordings, without the direct involvement of the individual being portrayed. The term "computer-generated" accurately describes the nature of content produced by generative AI: content based on algorithmic patterns and data without any direct involvement or actual performance by the individual being portrayed.[17] Generative AI strives to create content that is highly realistic and often indistinguishable from human-created content. New York's definition allows for clearer distinctions between AI generated sound recordings and those produced with more direct human involvement—beyond a user merely giving AI a prompt. The broad nature of this definition allows the public to determine which AI generated sound recordings are digital replicas and reduces confusion and improper artist association with AI generated sound recordings that artists had no direct involvement in creating. This definition may serve as a bridge between copyright law and state publicity right law by providing a means to enforce a right of publicity claim—subject to an implied preemption analysis—stemming from an AI generated sound recording.[18] Absent implied preemption issues, one may be able to raise a right of publicity claim

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[16] *Id.*

[17] *Id.*

[18] *See* Jackson v. Roberts (In re Jackson), 972 F.3d 25, 35 (2d Cir. 2020) (noting that implied preemption may provide a defense against a right of publicity claim which would impair a copyright holder's rights under the Copyright act or interfere with the proper functioning of the copyright system).

under the argument that an AI sound recording generated in the style of, for example hip-hop artist Drake, constitute a use of one's likeness under state publicity law.

V. Digital Replicas in HipHop

The AI generated track "Heart on My Sleeve" would fall within the scope of the "digital replica" definition as a sound recording that is so realistic that a reasonable observer would believe it was a performance by hip-hop artists Drake and The Weeknd.[19] The viral AI track mimicking the voices of Drake and The Weeknd, was submitted to the 2024 Grammy Awards for consideration in the Best Rap Song and Song of the Year categories.[20] The song's creator, a TikTok user named Ghostwriter, in conjunction with Recording Academy executive Harvey Mason Jr, submitted the AI generated track.[21] Despite label Universal Music Group, invoking copyright protections to get the song removed from streaming platforms due to the presence of producer Metro Boomin's producer tag, "Heart on My Sleeve" illustrates the ongoing battle in the music industry between artists and the use of generative AI.[22] While the imitation/ simulation "loophole" of § 114(b) fosters creativity and propels works in accordance to the letter and spirit of Copyright clause, it leaves many artists vulnerable to the rapid propagative capacity of generative AI. Absent a definition that encompasses generative AI sound recordings, the music industry may likely be no match for AI.

Respectfully submitted,
/s/ Calvin Sempebwa
Date: October 29, 2023

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[19] Joe Coscarelli, *An A.I. Hit of Fake 'Drake' and 'The Weeknd' Rattles the Music World*, N.Y. TIMES (Apr. 24, 2023), https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html.
[20] Sophie Caraan, *Recording Academy CEO Confirms AI-Generated Drake and The Weeknd Song Is Not Eligible for GRAMMYs*, HYPEBEAST (Sept. 9, 2023), https://hypebeast.com/2023/9/ghostwriter-ai-drake-the-weeknd-collab-song-heart-on-my-sleeve-submitted-grammy-awards.
[21] *Id.*
[22] Joe Coscarelli, *supra* note 19.