**Comment on the Copyrightability of Works Created Using Generative AI, and on the Fair Use of Training Models with Copyrighted Works**

From: Paul Henry Smith

## Introductory Note for Official Comment

As a professional composer, conductor, and music producer deeply engaged in the intersection of technology and the arts, I am writing to offer my insights on the subject of generative artificial intelligence (AI) and its implications for copyright law. My extensive experience in utilizing AI-assisted tools for producing copyrighted sound recordings, coupled with my role as a product designer of AI-powered software for creative artists, provides me with a unique perspective on these matters.

My professional journey has been marked by a commitment to exploring the creative possibilities afforded by emerging technologies, particularly in the realm of music production. This has not only informed my artistic practice but has also given me a profound understanding of the nuances involved in integrating AI into the creative process. My work in designing AI software solutions for artists has further deepened my appreciation for the delicate balance between technological innovation and artistic expression.

It is from this vantage point of combined artistic and technological expertise that I submit my comment. I believe that my background equips me with a measure of authority to contribute meaningfully to the ongoing discourse surrounding the copyrightability of AI-generated works. The views expressed in my comment are informed by both my practical experiences as a creator and my technical insights as a developer of AI-driven creative tools.

I trust that my comment will add valuable perspective to the discussion and aid in the development of a forward-thinking, balanced approach to copyright law in the age of generative AI.

Sincerely,

**Paul Henry Smith**
San Francisco

# Comment

To Whom It May Concern,

I write to address the vital question of how copyright law should adapt to the burgeoning field of generative artificial intelligence (AI). This inquiry not only has profound implications for individual creators but also for the wider ecosystem of cultural, artistic, and scientific innovation.

It is my position that works created using generative AI, under the significant guidance and decision-making of human creators, should be presumptively copyrightable.

**Defining the Creative Threshold**

The threshold for creativity required for copyright should recognize the human-AI collaborative process. I propose that works created without any human instigation or guidance specific to that work should not be eligible for copyright protection. Conversely, when a human creator provides conceptual direction and makes choices that guide the generative AI, the resulting work should be considered under the domain of copyright.

A relevant example is algorithmic or procedural generation techniques used in video games and digital art. Here, the programmer or digital artist sets parameters and algorithms which then produce a variety of outcomes. Each outcome is unique, and the initial creator is still recognized as the author because they created the system that generated the outputs. The case of generative music composition, where a composer might write a program that generates different musical pieces each time it's run, provides a similar paradigm—courts have typically recognized the composer's copyright in the output due to their creative input in crafting the program.

**Clarifying Authorship**

To incorporate AI into the framework of authorship, we must view the human creator as the author who utilizes AI as a tool. This parallels the concept of joint authorship but delineates the AI as an instrument rather than a co-author. The creative intent and decision-making process of the human artist ensure that the resulting work meets the originality requirement, as mandated by the Copyright Act.

## Fitting Within the Legal Framework

The legal precedent set by Feist Publications, Inc. v. Rural Telephone Service Co. emphasizes originality and a modicum of creativity as the benchmarks for copyright. The role of a human creator in directing AI to produce a work that reflects their creative vision and choices should be recognized as satisfying these requirements.

The creative choices and variations introduced by the author, even when using a mechanical process or following a certain algorithmic pattern, have already been deemed sufficient for copyright protection. This principle could be extended to works created with the assistance of generative AI: if a human author is making creative decisions that guide the generative process, the resulting work may be sufficiently original to warrant copyright protection.

## Policy Considerations and Safeguards

Underpinning the need for copyright is the constitutional mandate to promote the progress of science and useful arts. Excluding AI-generated works could impede both technological and artistic progress in several ways:

### Stifling Innovation in Artistic Methods

The exclusion of AI-generated works from copyright protection could discourage artists from experimenting with AI as a medium or tool for fear that their end products will not be legally protected. Just as the rise of digital photography invited a wealth of new techniques and artistic expression, so too does generative AI offer a new frontier for artistic exploration. By not recognizing the copyrightability of such works, we risk stifling the development of new artistic methods and forms of expression that could enrich the cultural landscape.

### Technological Advancement and Integration

Generative AI is not only a new tool for creating art but also a rapidly advancing technology that has the potential to be integrated into various aspects of society, including education, design, and entertainment. By recognizing the copyrightability of AI-generated works, we foster an environment that incentivizes innovation and integration of AI into new sectors, leading to advancements that could benefit society as a whole.

**Economic Incentives for Creative Industries**

Copyright protection serves as an economic incentive for the creation and distribution of original works. If AI-generated works are not protected, the economic model that drives much of the creative industry could be undermined. This would likely deter investment in new AI technologies and applications within the creative industries, slowing the pace at which these technologies improve and become more accessible to creators at all levels.

**Cross-Disciplinary Collaboration**

The integration of AI in the creative process encourages cross-disciplinary collaboration between technologists and artists. This collaboration is a driver of innovation, leading to the development of new AI technologies that are fine-tuned for creative applications. If the products of such collaborations are not copyrightable, there is less incentive for these two communities to work together, potentially slowing the cross-pollination of ideas that leads to breakthroughs in both fields.

**Precedent for Future Technologies**

How we handle the question of copyright for AI-generated works sets a precedent for future emerging technologies. A decision to exclude AI-generated works could set a restrictive precedent that may be applied to other technologies, possibly hindering progress in fields we have not yet imagined.

**Global Competitiveness**

On a global scale, if other countries offer copyright protection for AI-generated works and the United States does not, there could be a shift in where technological and artistic development is most vigorously pursued.

This could put the United States at a disadvantage in leading the global conversation on the intersection of technology and copyright.

In essence, by excluding AI-generated works from the ambit of copyright protection, we not only impede the development of generative AI as a tool for creative expression but also risk broader negative impacts on innovation, economic growth, and the United States' position as a leader in the creative and technological industries.

To counter potential abuses, guidelines delineating what constitutes a significant human contribution should be established. Documentation of creative intent and the human role in the AI's parameter selection process could serve as evidence of copyright eligibility.

**Proposed Framework for Copyright Evaluation**

Based on the discussion above, the following framework is proposed for evaluating the copyright eligibility of AI-generated works:

- There must be a clear demonstration of human authorship, where the human creator has made creative choices that guide the AI in producing the work.
- The work should reflect these human choices in a manner that introduces variation and is not simply the result of the AI's autonomous operations.
- The human creator's role in the selection, refinement, and curation of the AI-generated work must be substantial and significant enough to reflect their own original expression.

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**Subsection: The Role of Style and Sound Qualities in Copyright Law within the Context of Generative AI**

Within the creative arts, the emulation of style, tone, and other aesthetic qualities is a fundamental aspect of artistic development and cultural continuity. Historically, copyright law has wisely refrained from granting protection to these elements due to their abstract nature and the impracticability of enforcing exclusive rights over a style or a method. This principle has been instrumental in fostering artistic growth, allowing creators to build upon existing styles and techniques to develop their own voices and create works that resonate with audiences.

**The Embedded Knowledge of Styles in AI Tools**

Generative AI tools possess embedded stylistic knowledge derived from vast datasets. These tools, when directed by human creators, can produce works that echo the styles and qualities of existing genres or artists. The output, while reflective of recognized styles, is nonetheless a new creation shaped by the creator's unique input and interaction with the AI.

## Copyright Law and Stylistic Expression

The extension of copyright protection to stylistic elements would pose insurmountable challenges and inadvertently hinder the essential processes of artistic learning and exploration. Imitation and adaptation of style are critical for artistic development and for the creation of works that are accessible and engaging to audiences. If every nuance of a work were required to be completely original, the outcome would likely be alienating and counterproductive to the shared cultural experience.

## Precedent and Practical Application

The practice of imitating styles and tones has been a mainstay in the arts without any "clamoring" for copyright protection over these aspects. For instance, the rich tradition of artists learning through the replication of their masters' styles or musicians covering the works of others with a unique sound quality is a testament to this fact. These practices have coexisted with copyright law without conflict, as the law has focused on the tangible expression of ideas rather than the abstract elements of style or technique.

## Generative AI and Stylistic Reproduction

When a creator employs generative AI to emulate a style or tone, they engage in a process analogous to traditional methods of artistic creation. The AI serves as a tool, much like a paintbrush or a musical instrument, enabling the creator to articulate a vision that, while stylistically reminiscent of existing works, is a distinct creation in its own right. This is similar to "sound-alike" bands, artists inspired by the likes of Renoir, or writers who adopt the narrative style of admired authors. Such works, produced through human creativity and skill, are and have been eligible for copyright protection.

## The Means of Production and Copyrightability

The means by which stylistic echoes and imitations are produced should not be a determining factor in the assessment of copyright eligibility. Whether a work is created with a brush, a typewriter, or a sophisticated AI program, it is the original authorship—the creative decisions and expressions of the human creator—that qualifies the work for copyright protection. The application of style through generative AI should be

viewed as a continuation of traditional artistic practices, not as a departure warranting a different approach to copyright.

**Summary**

The use of generative AI to apply or emulate styles and tones in new works is a natural extension of longstanding artistic practices.

The question of copyrightability should rest on the tangible expressions of creativity and not on the abstract qualities of style or method.

The current framework of copyright law already strikes an appropriate balance, ensuring that creators can draw from the cultural well while contributing their own original voice to the artistic conversation. As such, generative AI's role in stylistic reproduction does not necessitate a reevaluation of fundamental copyright principles.

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**Subsection: Addressing the Copyright Implications of Training Language Models on Copyrighted Works**

The use of copyrighted materials in the training of language models (LMs), such as generative AI, raises significant questions regarding copyright law. It is essential to address whether the use of these materials in training, particularly when done in a manner that constitutes fair use, infringes upon the copyrights of the original works.

**Understanding the Nature of Training Language Models**

Language models are trained using vast datasets that include a wide range of texts. The purpose of this training is not to replicate the content but to develop an understanding of language patterns, structures, and styles. This process is analogous to how human creators learn from existing works—they read, absorb, and understand styles and content, which subsequently informs their own original creations.

**Fair Use Considerations**

The principle of fair use, as outlined in 17 U.S.C. § 107, is particularly relevant here. Training LMs involves transformative use, where the purpose is not to reproduce copyrighted works but to create a tool capable of understanding and generating language. Courts have

recognized transformative use as a key factor in fair use analysis, as in *Kelly v. Arriba Soft Corporation* (280 F.3d 934 (9th Cir. 2002)), where the use of thumbnail images in a search engine was deemed transformative.

**No Direct Competition with Original Works**

Another critical consideration in the fair use analysis is the effect of the use on the potential market for or value of the copyrighted work. The training of LMs does not seek to replace or replicate the original works. Instead, it serves a fundamentally different purpose—creating an AI capable of generating new, original content. Thus, it does not impinge upon the traditional market for the original works.

**Precedent in Machine Learning and Fair Use**

The precedent set in *Authors Guild v. Google, Inc.* (804 F.3d 202 (2nd Cir. 2015)), where the court found Google's book scanning project to be a fair use, is instructive. The project, which involved scanning books to create a searchable database, was deemed transformative and not harmful to the market for the original works. Similarly, the use of copyrighted materials in training LMs can be seen as a transformative process that does not compete with the original works.

**Summary**

Given the transformative nature of the use of copyrighted works in training LMs and the lack of direct competition with the market for these works, such use can be argued to fall within the ambit of fair use. This position supports the continued advancement and application of AI technologies in various fields, fostering innovation and creativity. As with any emerging technology, it is imperative that the legal framework adapts and provides clear guidelines that balance the interests of copyright holders with the broader goals of innovation and societal advancement.

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**Conclusion**

In light of the aforementioned considerations and legal precedents, I urge the Copyright Office to adopt a framework that acknowledges the essential role of human creativity in works generated with the aid of generative AI. By doing so, copyright law will continue to fulfill its constitutional mandate to promote the

progress of science and the useful arts by protecting human creativity, regardless of the medium or tools employed in the creative process.

The introduction of AI into the realm of creative tools does not necessitate a reevaluation of the criteria for copyright eligibility. Instead, it reaffirms the need to focus on the creative contributions of the human author. It is these contributions—decisions, directions, and originality—that infuse the work with the requisite level of creativity for copyright protection. AI, as a sophisticated tool, does not diminish the role of the human creator but serves to expand their creative potential.

Consequently, the use of AI in the production of works should not preclude, a priori, their copyrightability.

The expansion of copyright law to include AI-generated works in all forms of media is a forward-looking approach that aligns with the foundational goals of copyright—to promote innovation and protect human creativity.

By adopting a framework that recognizes the diverse applications of generative AI, we ensure that copyright law remains relevant and robust in the digital age, fostering the growth of creative industries and safeguarding the rights of creators.

Thank you for your attention to this critical matter affecting the future of copyright law and artistic innovation.

Respectfully submitted,

**Paul Henry Smith**
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