

*Submitted by Timothy A. Cohan
on behalf of peermusic
and by Alex Mitchell on behalf of Boomy*

Before the
UNITED STATES COPYRIGHT OFFICE
The Library of Congress

In re:

Artificial Intelligence and Copyright

Docket No. 2023-6

**COMMENTS OF PEERMUSIC AND BOOMY ON THE NOTICE OF INQUIRY AND
REQUEST FOR COMMENTS RE ARTIFICIAL INTELLIGENCE AND COPYRIGHT**

Peermusic and Boomy respectfully submit the following comments in response to the Notice of Inquiry and Request for Comments (the “AI NOI”) issued by the United States Copyright Office (the “Office”), 88 Fed. Reg. 59942 (August 30, 2023).

Peermusic is the trade name for a group of music publishing designees under common family ownership since the company’s establishment in 1928. In addition to its founding role in discovering and promoting Rhythm and Blues, Jazz, Latin, and Country music from the beginning of the recording era, Peermusic writers were key players in the birth and growth of Rock 'n' Roll. Today Peermusic holds extensive catalogues in a variety of genres and continues to cultivate new songwriters across the creative spectrum. The firm is currently led by CEO Mary Megan Peer and Executive Chair Ralph Peer, II, who oversee a network of 39 offices in 32 countries. Peermusic thanks the Office for its request for comments on copyright law and policy issues arising from the development of artificial intelligence (“AI”) systems and their potential impact upon the creative industries.

Boomy is a leading generative AI music company where millions of people all over the world create, publish, and monetize generative songs – nearly 18 million songs to date. It was founded in 2019 on the principle that AI doesn’t create music, people create music with AI, and its flagship platform is used by first-time music makers and veteran musicians alike. With backing from major music industry rightsholders as well as technology-focused venture capital, Boomy respects the work of creative artists and has committed not to train models for commercialization which would implicate the work of copyright owners without a framework for remuneration. Boomy’s perspective as both a rightsholder and developer of AI music systems has lent a unique voice to the Office through its participation in multiple events over the years. The Boomy team very much appreciates the Office’s continued commitment to hearing from a diverse set of voices on these important topics.

The respective interests of technology companies and music publishers have not typically been viewed as aligned on issues of copyright in the digital era. However, in the course of the productive discussions encouraged by the Office – in particular the Office’s Music and Sound Recordings Listening Session of May 31, 2023¹ – it became clear to Peermusic and Boomy that our firms agree on certain key issues affecting our respective companies and stakeholders.

In the hopes that a focus on these key areas of consensus from two entities normally on opposite sides of the negotiating table will assist the Office in its assessment of questions concerning legislation or regulation around AI systems, Boomy and Peermusic would like to share their respective views on certain general principles on which we agree.

Within this context, we address those of the Office’s questions in the AI NOI to which we hope we can provide replies that illuminate our shared perspectives. In certain instances our views will diverge; in those cases we hope that our differing viewpoints will assist the Office in identifying areas in which guidance will be particularly useful.

1. As described above, generative AI systems have the ability to produce material that would be copyrightable if it were created by a human author. What are your views on the potential benefits and risks of this technology? How is the use of this technology currently affecting or likely to affect creators, copyright owners, technology developers, researchers, and the public?

Peermusic sees in certain AI systems the potential benefits of expanding scope of tools available to writers and composers, and the opportunity for those tools to stimulate, enrich, enhance and contribute to the creative process. We share the concerns expressed by many in various sectors of the creative and copyright industries regarding the widespread distribution of purely generative AI content with no creative human input. We believe that a bright line should be drawn between original, copyrightable content and content generated automatically without human intervention. However, we believe that current copyright law and guidance, properly applied as and when live controversies arise, already draw that bright line.

Boomy generally shares peermusic’s view, but considering its own users and stakeholders, would expand upon the potential benefits mentioned above, beginning by pointing out that at the heart of generative music AI’s benefits is an often-overlooked constituency: creative humans who want to express themselves musically, but lack the necessary resources to do so. The history of music has always been one of technology lowering barriers, enabling more people to participate in the music economy. The tools used by most musicians today – synthesizers, digital audio workstations (“DAWs”), and Auto-Tune – are all examples of automation that have enabled some so-called “bedroom musicians” to become global superstars; each of these technologies was vilified by incumbents at the outset of their introduction. In fact, at its outset, even recorded music was dismissed as a concept in its earliest years.

Boomy sees generative AI as the next step in this evolution. When deployed properly, this technology has the potential to reduce the barrier to creation to levels so low that the human

¹ *Copyright and Artificial Intelligence Music and Sound Recordings Listening Session*, May 31, 2023, transcript and recording available at <https://www.copyright.gov/ai/listening-sessions.html> (“Music and Sound Recordings Listening Session”).

element in the creation process might easily be misinterpreted as immaterial, in the same way that artists who employ Auto-Tune creatively might be accused of not being “real” singers. However, despite being driven by algorithms not so different from those discussed here, we are aware of no suggestions that a sound recording embodying a vocal employing Auto-Tune should not be copyrightable. To those of us working in the field of artificial intelligence, it is apparent that generative AI is opening up a new generation of creative arts, enabling all creative humans to express themselves in novel ways.

At the same time, depending on one’s lens of commercial interest, the greatest benefit of generative AI – increased participation – may also be its greatest risk. The current music industry business models already face challenges from the scale of new content caused by a growing creator community, aided by technological advancement unrelated to AI. In many ways, the proliferation of AI-generated music is a response to consumer demand for easier means to create and engage with content. The introduction of AI tools have accelerated these existing challenges. Incumbent stakeholders can face these challenges together by finding common ground on the questions brought forth by the Copyright Office today – particularly with respect to copyrightability of AI-assisted works, valuing the human effort behind “AI-assisted” works, and ensuring ethical training standards.

2. Does the increasing use or distribution of AI-generated material raise any unique issues for your sector or industry as compared to other copyright stakeholders?

Peermusic points out that the music publisher exists to foster the creation, administration, and monetization of musical works. Few sectors of the industry are as purely copyright-dependent as music publishing. As a result, the markets and business models of music publishing are highly sensitive to changes in the application or interpretation of copyright law. To the extent the increasing use or distribution of AI-generated material may drive changes in the rules and legal presumptions around creativity and copyrightability that lie at the heart of music publishing commercial practices, we are acutely aware of the risks of disruption to those rules and presumptions.

In the face of widespread use and dissemination of AI-generated materials, the core concern of the music publisher is the risk of an overall diminution of the value of copyright in musical works – whether that dilution in value comes from waves of auto-generated AI content in the market, or from potentially overbroad legal presumptions of non-copyrightability of AI content. We remain mindful that the risks arising from the growth of AI may come from our collective responses to AI as much as from the technology itself.

From the perspective of AI developers, Boomy would emphasize that one of the largest concerns of AI developers is the lack of legal clarity or licensing standards regarding the use of copyrighted material for model training. However, these issues – including models for permissioned use of content and rightsholder remuneration – are actively being worked out through natural market forces.

Are there any statutory or regulatory approaches that have been adopted or are under consideration in other countries that relate to copyright and AI that should be considered or

avoided in the United States? How important a factor is international consistency in this area across borders?

A standard for authorship already exists in the United Kingdom for cases in which there is little to no human intervention in the creation of a work. Specifically, section 178 of the Copyright, Designs, and Patents Act (“the CDPA”) defines a computer-generated work as “a work generated by computer in circumstances such that there is no human author of the work.”² For such works, the author is deemed to be the “person by whom the arrangements necessary for the creation of the work are undertaken.” It follows in these cases under the CDPA that the person who sets up the computer or software to produce the work is treated as the author, even if that person did not directly create the content.

Given the global nature of content distribution, we believe that the principles of the Berne Convention remain relevant in the discussion of the copyright and AI. We firmly believe it is necessary to ensure consistent copyright policies across nations for reasons of commercial certainty, artistic freedom, and technological progress, and a host of other reasons, not least of which are the requirements of Berne.³ We would also caution against putting U.S. works at a disadvantage with over-restrictive regulations, but instead strive to ensure that the U.S. continues to lead the global creative economy by continuing to reward those authors who utilize AI tools to create new copyrightable works.

5. Is new legislation warranted to address copyright or related issues with generative AI? If so, what should it entail?

Peermusic agrees with many in the industry that the current Copyright Act is well-equipped to address and resolve the questions of copyright law that will arise as AI technology develops and is integrated and applied in the market. Just as the courts have interpreted the application of the law to innovative technologies -- from piano rolls to digital reproductions -- we are confident that the courts will provide clarity as and when actual controversies and questions arise.

Boomy agrees that the existing framework of U.S. copyright law is sufficient to address copyright issues, provided that the long-held “modicum of creativity” standard is not challenged unnecessarily, as discussed at greater length in our joint response to Question 18, below. Neither peermusic nor Boomy takes a position at this time as to whether legislation is warranted to address non-copyright issues with generative AI.

6.2. To what extent are copyrighted works licensed from copyright owners for use as training materials? To your knowledge, what licensing models are currently being offered and used?

A number of licenses for the use of copyrighted works in the development of AI systems have been publicly reported. While peermusic is currently in discussions with potential licensees, these negotiations are in the early stages and no single model has emerged.

² The Copyright, Designs and Patents Act (CDPA), 1988, ch.10, § 178 (U.K.)

³ Berne Convention for the Protection of Literary and Artistic Works (1979), Article 5(2).

Boomy would add that to improve the capabilities of its platform for users, it aims to partner with rightsholders to fairly compensate the owners of works used as training materials.

9. Should copyright owners have to affirmatively consent (opt in) to the use of their works for training materials, or should they be provided with the means to object (opt out)?

Peermusic opposes opt-out regimes in all cases, as the principles underlying such regimes contradict the exclusive rights of the copyright owner clearly set forth in the Copyright Act, in which exceptions to these exclusive rights are, as a rule, narrowly tailored and clear. We believe that such a process would be especially disadvantageous to the rights of small to medium-sized music publishers, and above all to self-published songwriters. We cannot predict the number of licensees that would take advantage of such a system, nor the resources that would be required to identify and assess each such licensee and license in context, but we are fairly certain that the burden on copyright owners would be substantial and without justification as a matter of policy or the law.

Boomy takes no position at this time on the question of opt-in or opt-out regimes.

9.1. Should consent of the copyright owner be required for all uses of copyrighted works to train AI models or only commercial uses?

To the extent that the question presupposes that the non-commercial use of copyrighted works to develop AI models could be pre-emptively deemed to be fair use of such works, peermusic notes that the distinction between commercial and non-commercial uses represents but one element of one factor of the statutory fair-use analysis. We do not believe that certain non-commercial users of copyrighted works (AI developers) ought to be entitled to bypass the rest of the statutory analysis⁴ while all other users asserting fair use – commercial and non-commercial alike – would remain subject to the full statutory multi-factor test.

9.3. What legal, technical, or practical obstacles are there to establishing or using [an opt-out] process? Given the volume of works used in training, is it feasible to get consent in advance from copyright owners?

As noted in response to question 9 above, peermusic believes that the legal obstacles to the establishment or use of an opt-out process are the relevant provisions of the Copyright Act, which vest in the owner of copyright the exclusive right to grant, or authorize others to grant, any of the enumerated rights set forth in Section 106.⁵ Exceptions to these exclusive rights are explicit in the statute, and we believe that an opt-in scheme that limits or abrogates those rights could only do so pursuant to an act of Congress. Industry practice shows that the imposition of such a regime is unnecessary; there is no licensing market failure to correct. For more than a decade, digital service providers, user-generated content platforms, and a range of other copyright-dependent services have worked with music publishers and the NMPA to establish direct and model licenses on a purely opt-in basis eventually covering hundreds of licensees, in each case representing the vast majority of copyright owners in the market.

⁴ 17 U.S.C. 107.

⁵ 17 U.S.C. 106.

While continuing to reserve comment on the efficiencies or legal support for different types of opt-in or opt-out processes that may be proposed, Boomy agrees that the music industry has demonstrated decades of success in establishing relationships between digital service providers and rightsholders, including with respect to user-generated content on social media platforms. Despite owning millions of copyrights, the record labels and music publishers have been able to effectively negotiate deals with digital companies of all sizes for the use of their works. These deals include not only financial terms, but very complex data and reporting requirements, attribution, and service functionality limitation. The same model can be applied to companies seeking to obtain licenses for training their AI on copyrighted works.

10. If copyright owners' consent is required to train generative AI models, how can or should licenses be obtained?

We would refer to our answer to Question 9.3 above with respect to the successful licensing models already in place in the industry.

10.1. Is direct voluntary licensing feasible in some or all creative sectors?

Yes. As noted in questions 9.3 and 10 above, within the music industry there is a recognized -- and thriving -- voluntary licensing regime for all types of music users (digital service providers, venues, other media companies, etc.) to request, negotiate, and obtain the proper authorizations from record labels and music publishers to utilize copyrighted works in a variety of ways.

10.3. Should Congress consider establishing a compulsory licensing regime? If so, what should such a regime look like? What activities should the license cover, what works would be subject to the license, and would copyright owners have the ability to opt out? How should royalty rates and terms be set, allocated, reported and distributed?

Congress should not consider establishing a compulsory licensing scheme, as current voluntary licensing models are working, there is no market failure to correct, and such a scheme would unnecessarily abrogate the rights of copyright owners to exercise the rights and authorize the activities set forth in Section 106 of the Copyright Act.⁶

11. What legal, technical or practical issues might there be with respect to obtaining appropriate licenses for training? Who, if anyone, should be responsible for securing them (for example when the curator of a training dataset, the developer who trains an AI model, and the company employing that model in an AI system are different entities and may have different commercial or noncommercial roles)?

We see no legal impediments. Any party that seeks to exercise or exploit any of the exclusive rights of a copyright owner under U.S. law can only do so under must have direct or otherwise authorized permission to do so.

⁶ 17 U.S.C. 106.

18. Under copyright law, are there circumstances when a human using a generative AI system should be considered the “author” of material produced by the system? If so, what factors are relevant to that determination? For example, is selecting what material an AI model is trained on and/or providing an iterative series of text commands or prompts sufficient to claim authorship of the resulting output?

We thank the Office for this clear formulation of what we believe may emerge as the essential questions facing songwriters, music publishers, and music platforms built around AI. While the requirements to license input used in the development of AI systems are in our view clear, and while the industry is correct to reject broad claims that such licenses are not required, we believe that the questions around copyrightability of AI content will ultimately prove of even greater consequence to the songwriter, music publishing, and creative communities. We believe it is critical that the Copyright Office and the law address the questions of copyrightability with a view both to the risks posed by AI and the possible unintended consequences of over-regulation of AI technologies.

In short, we believe that in some cases, a person interacting with AI-generated material may be considered the author of the material produced using the applicable AI tool, where the user provides the creative input required under the law. We believe that current copyright law already excludes near-universally objectionable AI output from copyright protection and that no further regulation, legislation, or formalities of registration are required.

At the outset we believe it is important to acknowledge that there is no industry-standard definition of artificial intelligence. While we appreciate the Office’s glossary of key terms in the AI NOI, the closer we examine the definitions, the less confident we become in our ability to apply them in practice, if we or our songwriters were to be required to do so with respect to every musical work we register.

The AI NOI defines AI as “[a] general classification of automated systems designed to perform tasks typically associated with human intelligence or cognitive functions,” with the added requirement that such systems “employ machine learning.”⁷ We would ask for further clarification as to the standards we would apply to determine what is “typical” and whom we are to presume is making the associations. The references cited within the definition do not clarify: Public Law 215-32 requires that an AI system “solve tasks requiring human-like perception, cognition, planning, learning, communication, or physical action.”⁸ This formulation is not the same as the Office’s proffered definition. To require *objectively* “human-like” qualities in the *solution* of tasks is different from requiring that certain observers *subjectively* associate the *tasks themselves* with human intelligence or cognition. The further citation to Public Law 117-263

⁷ U.S. Copyright Office, Library of Congress. Artificial Intelligence and Copyright Notice of Inquiry and Request for Comments (“AI NOI”), 88 Fed. Reg. 59942 (August 30, 2023), 59948.

⁸ *John S. McCain National Defense Authorization Act for Fiscal Year 2019*, Public Law 115–232, sec. 238(g)(2), 132 Stat. 1636, 1697–98 (2018) (cited in AI NOI, 59948 FN 55).

does not provide meaningful assistance in clarifying the definition, as in that case an “artificial intelligence system” is effectively defined as any system that uses artificial intelligence.⁹

Definitions of subcategories inherit and amplify the ambiguity of the parent category; for example, “generative AI” is defined as: “an application of AI used to generate outputs in the form of expressive material such as text, images, audio, or video.”¹⁰ Certainly without a clear definition of AI, the definition of generative AI would be exceedingly overinclusive, covering everything from word processors to digital cameras to electronic musical instruments, unless “expressive material” is taken to limit the scope of the output to “material that would be copyrightable if it were created by a human author.”¹¹ However, even this intuitive description covers more than it means to: randomly generated textual output would in many cases also be copyrightable if that same output were created by a human author; there is no requirement under copyright law that copyrightable content make sense. Randomly generated text is certainly not what we mean to include in “generative AI,” as the entire purpose of such tools is to create output that is *not* random.

The inconsistency among competing definitions of AI and subcategories of AI caution against any attempt to establish blanket rules applicable to the registration of all AI-related content or of “generative” AI. However, we do not need an immutable definition of AI – or any definition at all – to counter the anticipated parade of horrible effects of AI on the creative industries. To exclude the sort of automatically generated, mass-produced, generative AI content that most already agree should be excluded, we need only describe what copyrightable authorship excludes -- as the Office has already clearly done.

The Office has said that copyright protection cannot extend to works created by “a machine or purely mechanical process that operates randomly or automatically without any creative input or intervention from a human author.”¹² We are confident that the application of this rule can easily dispense with most, if not all, of the theoretical applications of AI of most concern to the creative industries, without the need to commit to a definition of AI technology that, at the very least, is unlikely to remain accurate for long. At the same time, the rule as formulated leaves room for a presumption of copyrightability in works that combine the use of AI with the creative input of one or more human authors.

We would argue that the rule excludes the sort of AI output that threatens songwriters and undermines the aims of copyright law, but it is not so inclusive as to encompass all applications that use AI. The relevant question in most cases will be whether the AI-generated content was generated via a process that “operates randomly or automatically without any creative input or intervention from a human author.” As noted above, AI-generated output is not randomly

⁹ *James M. Inhofe National Defense Authorization Act for Fiscal Year 2023*, Public Law 117–263, sec. 7223(4)(A), 136 Stat. 2395, 3669 (2022) (cited in AI NOI, 59948 FN56).

¹⁰ AI NOI at 59948.

¹¹ AI NOI, Question 1, at 59946.

¹² *Compendium of U.S. Copyright Office Practices (Third Ed.)* §313.2.

generated, so in most cases in which it will be necessary to examine output created with an AI tool, the determinative question will be whether the AI process operated without any “creative input” or “intervention from a human author.”

The test that can be inferred from the rule as stated in the Compendium is well-supported by the law, including recent decisions. *Thaler v. Perlmutter* put the question unequivocally before the court as “the sole issue of whether a work generated entirely by an artificial system absent human involvement should be eligible for copyright.”¹³ The court’s answer was correct: no. In limiting the application of *Burrow-Giles v. Sarony*,¹⁴ which allowed for copyright in photographs, the court cautioned that “[c]opyright has never stretched so far...as to protect works generated by new technology absent any guiding human hand.”¹⁵

It is important to acknowledge that the court in *Thaler* did not uphold the disqualification of the registration because the plaintiff used AI in the creation of the work; the court upheld the disqualification because the work was created “absent any human involvement.”¹⁶ While “human authorship” is unquestionably a prerequisite for copyright protection, the phrase is arguably redundant, as there can be no other kind of authorship. The “nature of authorship” is unquestionably human.¹⁷ As Judge Howell clearly asserts, “[t]he 1976 Act’s ‘authorship’ requirement as presumptively being *human* rests on centuries of settled understanding...”¹⁸ Accordingly, the distinction between “human” and “non-human” contributions in this case – and in all cases involving AI – is inapposite. Purely generative AI output is excluded from copyright protection under existing law not because AI is non-human; there is no non-human authorship in AI. There is no authorship at all. Non-human *standing* was relevant in *Naruto*, where the court faced the question of whether a monkey could sue people and corporate entities for damages and injunctive relief,¹⁹ or, put otherwise, whether “a non-human sentient being [a monkey] may be ‘covered by ‘person’ in the Copyright Act...”²⁰ Whether AI is now or ever will be sentient is, to borrow a phrase, “fun conjecture for academics,”²¹ but we agree with Judge Howell that

¹³ *Memorandum Opinion, Thaler v. Perlmutter*, 1:22-CV-01564, 1 (D.D.C. Aug. 18, 2023)

¹⁴ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884)

¹⁵ *Thaler* at 8, *emphasis added*.

¹⁶ *Id.* at 15.

¹⁷ *Burrow-Giles*, 111 U.S. 53 at 61, referring to the “views of the nature of authorship” set forth in *Nottage v. Jackson*, 11 Q.B.D. 627 (1883).

¹⁸ *Thaler* at 9; see also *id.* at 10 (“...authorship is synonymous with human creation...”).

¹⁹ *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

²⁰ *Thaler*, 1:22-CV-01564, at 9 n.2.

²¹ Justin Hughes, *Restating Copyright Law’s Originality Requirement*, 44 COLUMBIA J. L. & ARTS 383, 408–09 (2021), cited in *Thaler*, 1:22-CV-01564, at 9 n.2.

“delving into this debate is an unnecessary detour.”²² We need only ask whether the output was created by an automated process; the AI generator meets this criterion, and so we can leave AI behind and move to the question of whether or not the human subsequently claiming copyright has added the requisite level of creative input prior to registration for copyright.

What, then, is the requisite level of “creative input?” We know well from discussions with colleagues and partners in the industry that reasonable minds will disagree on the “challenging questions” described by Judge Howell in *Thaler*:

“...how much human input is necessary to qualify the user of an AI system as an ‘author’ of a generated work, the scope of the protection obtained over the resultant image, how to assess the originality of AI-generated works where the systems may have been trained on unknown pre-existing works, how copyright might best be used to incentivize creative works involving AI, and more.”²³

We agree with the court that the questions are challenging and would caution against default rules that presuppose specific answers. Asking “how much human input is necessary” to bestow authorship on an AI user is to presuppose that it is an open question. We noted with some concern the contrary sentiment in the letter from the Review Board of the United States Copyright Office (the “Board”) to Tamara Pester, Esq. (representing Jason M. Allen) of September 5, 2023, which presumed that the question was closed: by categorically disqualifying even hundreds of iterative “prompts,” the Board effectively asserted that *no amount* of input to an AI system will qualify the user as the author of the results.²⁴ Accordingly, we are grateful that the Office now presents the question to the creative and copyright communities, by asking whether “...providing an iterative series of text commands or prompts [is] sufficient to claim authorship of the remaining output...”²⁵ We believe that under the law, the answer will sometimes be “yes.”

Copyright law requires no more than “some creative spark” for a work to meet the minimal requirements of copyrightability set forth by the Supreme Court in *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*: “[t]o be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily...”²⁶

²² *Thaler*, at 9 n.2.

²³ *Id.* at 13.

²⁴ *Second Request for Reconsideration for Refusal to Register Théâtre D’opéra Spatial* (SR # 1-11743923581; Correspondence ID: 1-5T5320R), United States Copyright Office (Sept. 5, 2023) (“Allen Letter”)

²⁵ AI NOI, Question 18, at 59947.

²⁶ *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); see also *Hoague-Sprague Corp. v. Frank C. Meyer Co.*, 31 F.2d 583, 586 (“the originality required in case of copyright means little more than a prohibition of actual copying”).

In some cases, where an author’s contributions to a work display the “requisite level of creativity,” it does not matter whether the author has created any element expressed in that work in order for the author to claim copyright in the entire work. The Office has itself cited *Burrow-Giles* in support of its guidance, the seminal case establishing support for the copyrightability of photographic output.²⁷ In *Burrow-Giles*, the Supreme Court rejected the argument that photographs lacked authorship because photographs were mechanically produced. The court did not say that photographs were *per se* copyrightable, but found that the photographer’s operations in arranging the subject and the visual elements of the portrait constituted sufficient creative input to render the photograph a copyrightable work of authorship. While the court conceded that there may be cases in which “slavish copying” of the subject would fail the test of authorship,²⁸ the “prevailing view” that emerged from over a century of subsequent case law holds that “almost any[] photograph may claim the necessary originality to support a copyright merely by virtue of the photographers’ personal choice of subject matter, angle of photograph, lighting, and determination of the precise time when the photograph is to be taken.”²⁹

It is important to note that once the test is passed, copyright in the entire photograph is deemed to have vested in the author from creation; it is not a partial, limited, “thin,” or otherwise diminished copyright. The test should not be conflated with the “selection and arrangement” standard, which is similar but excludes the non-copyrightable elements of the work.³⁰ The test of copyrightability as applied to photographic works is the appropriate one to apply to content generated with some degree of AI. In both cases, the output of purely mechanical processes must be enriched by human involvement that meets a minimum threshold of creativity. In both cases, the determination can only be made on a case-by-case basis, involving an assessment of how the human author contributes to and engages with the work.

As low as the threshold of creativity and authorial intervention may be, it is nevertheless well-suited to the task of barring claims of copyright for the sort of AI output that could overwhelm the creative industries and dilute the value of human authorship. The test would immediately exclude content generated without any human involvement. It is also difficult to imagine how a single “...prompt from a human [that] produces complex written visual, or musical works in response”³¹ would qualify as “exercis[ing] significant aesthetic judgment.”³² In most cases the test would exclude output generated from a series of unimaginative and generic prompts. It is

²⁷ *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, 88 Fed. Reg. 16,192 (Mar. 16, 2023).

²⁸ *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (1988).

²⁹ Melvin B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.08[E][1], at 2-130 (1999), cited in *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076 (2000).

³⁰ *Feist* at 349.

³¹ *Copyright Registration Guidance: Works Containing Materials Generated by Artificial Intelligence*, 88 FR 16190, 16192 (Mar. 16, 2023)

³² *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 310 (2000).

also not difficult to conceive of a series of precise, iterative prompts that progressively refine the AI output ultimately to reflect substantially more creative influence over the results than required in the photography cases. We acknowledge that the Board was unmoved by the 624 iterations of prompts by Mr. Allen to arrive at “Théâtre D’opéra Spatial.”³³ However, we believe that if the prompts resulted in producing even minimal intended changes to “...background, light, and shade...,” for example,³⁴ then the image should have been affirmed in its entirety as a work of authorship under *Barrow-Giles* and its progeny.³⁵

There will be cases in which the “selection and arrangement” test will be appropriate, and in which disclaimer of the non-protectible elements of the resulting work will be required. When it is clear that individual outputs of an AI system have been created without a minimum “spark” of human creative input, then those outputs may in some cases be selected, arranged, or compiled in such a way that the author may claim copyright in the resulting work, provided that copyright protection does not extend to the unprotectible elements of the work.³⁶ Take, for example, the case of a visual artist who uses AI to generate a series of images of flowers randomly or with unoriginal prompts and then selects some based on color, form, and other aesthetic criteria, finally arranging all of the selected images without further modification into a book. The analysis to apply in this example does not stray far from the Office’s analysis of the images and text in *Zarya of the Dawn*,³⁷ except that we would respectfully submit that the images ought to have been subject to an analysis under the *Burrow-Giles* standard to determine whether they had been created with the requisite level of creative input – for example, whether the pictures had been generated via a limited number of generic prompts with no refining changes to the “background, light, or shade” of the generated images.

In the context of the Office’s welcome questions on copyrightability, we would like to conclude with some considerations as to registrations. We appreciate the Office’s efforts in developing

³³ Allen Letter at 7.

³⁴ *SHL Imaging, Inc.*, at 309, citing *Eastern Am. Trio Prods.*, 97 F. Supp. 2d 395 (2000).

³⁵ We would also ask why, in every case, we are certain that the creative human input requirement cannot be met by the particular AI system employed. A couple of examples at the margins may demonstrate the difficulty of a categorical rule here as well: Imagine that a songwriter were independently to create a songwriting algorithm embodying her aesthetic choices and judgments, apply machine learning to that algorithm with reference solely to original musical works she had created, and then run the program to produce a musical work. Should she not be entitled to claim copyright in the song? If not, what is the forbidden step in this entirely personal creative process? We can then (perhaps more easily) imagine that her authorship in the input arises from valid work-made-for-hire agreements with third parties who have created the (wholly original) input, and that material is further used to train an algorithm created by her employees, also as works made for hire. While we would want to examine any claims of authorship based on original input and proprietary algorithms very closely, we do not believe there has been sufficient analysis to render an opinion on whether an algorithm may be sufficiently creative and original in its design as to inform the “creative human input” analysis in any particular case.

³⁶ *Feist*, 499 U.S. 340 at 348 (“...[C]hoices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.”).

³⁷ *Zarya of the Dawn* (Registration # VAu001480196), United States Copyright Office (Feb. 21, 2023).

the guidance to date, and in particular the online webinar of June 28, 2023,³⁸ which acknowledged many of the concerns we raised in our comments during the discussion with the Office and fellow stakeholders on May 31, 2023 regarding potential for confusion, administrative bottlenecks, and inconsistencies in the newly promulgated guidance.³⁹ As is clear from the discussion above, we respectfully disagree with the position that the development of AI requires or has led to an inevitable “fifth category of unclaimable material.”⁴⁰ We agree that disclaimer of underlying AI elements in the copyright registration process is appropriate where those elements lack the level of human input deemed sufficient in the photography cases, but that in all other cases, no disclaimer of AI content is required as a matter of law.

While neither peermusic nor Boomy is confident that current descriptions and attempts to define “artificial intelligence,” “training,” “generative AI,” or a range of associated terms are complete, final, or even useful in these early stages of deployment of the technology, peermusic is confident that the songwriters we represent, as well as the producers, engineers, and other collaborators that contribute to the creation of musical works, are currently using AI under any definition of the term. Further, we have no doubt that AI technology will eventually become ubiquitous, underlying countless tools in the creative process. It is unlikely that a songwriter will be aware of the extent to which AI – however it may be defined – will have been used in the creation of a musical work, or whether AI was used at all.⁴¹ Nor will the songwriter’s publisher or the Copyright Office be in a better position to identify whether any particular elements of a given work were created in an AI-dependent or AI-assisted process.

The analysis will be fact-intensive in every case, and as a result does not lend itself to *per se* rules, nor a presumption of non-protectability. With due respect to the Office’s extensive expertise, we do not see the wisdom of placing the responsibility on the Office to resolve the “challenging questions” left open in *Thaler* on a registration-by-registration basis – in the face of what are likely to be exponentially increasing numbers of works requiring analysis under current guidelines. We would instead suggest that the courts are better positioned to address the “challenging questions,” in a forum in which the finder of fact may evaluate both the technology and the creator’s engagement with it on a case-by-case basis, through evidentiary hearings where appropriate, in those cases where the parties have determined it is in their economic interests to seek adjudication.

³⁸ *Application Process for Registration of Works With Artificial Intelligence-Related Content*, transcript (“Registration Guidance Webinar Transcript”) and recording available at <https://www.copyright.gov/events/ai-application-process/> (“Registration Guidance Webinar”)

³⁹ Music and Sound Recordings Listening Session, May 31, 2023.

⁴⁰ Registration Guidance Webinar Transcript at 1.

⁴¹ Under the Copyright Office’s suggested guidance, we must either require our writers to disclose with specificity any AI in the works they deliver, or warrant and represent to us that they did not use AI. Some publishers may create opportunities for disclosure, but many will more simply prohibit the use of AI within standard contractual warranties and representations of originality. Consequently, requirements for disclosure of AI content will create a tripwire to breach of contract that doesn’t exist today: a writer may believe the use of AI was *de minimis* and fail to disclose, or be entirely unaware of the use of AI by a co-writer or producer, or simply elect not to disclose for her own reasons.

Few seem to dispute the proposition that purely AI-generated content, with no human involvement, should not qualify for copyright protection. However, from Peermusic's perspective, it is not credible to imagine that our writers will put their names to works they have had no hand in creating. We must afford our songwriters a presumption of integrity; we believe – and choose to continue to believe – that our writers' warranties of originality in the works they entrust to us are and will continue to be made in good faith. If a writer can survey the full range of talents, inspiration, instruments, technology and tools she has employed in the creation of a work, and represent that work as her own, we believe she is entitled to the legal benefit of a presumption of authorship in that work.

19. Are any revisions to the Copyright Act necessary to clarify the human authorship requirement or to provide additional standards to determine when content including AI-generated material is subject to copyright protection?

As stated more fully in our response to Question 18 above, no revisions to the Copyright Act are necessary to clarify that “authorship is synonymous with human creation.”⁴²

20. Is legal protection for AI-generated material desirable as a policy matter? Is legal protection for AI-generated material necessary to encourage development of generative AI technologies and systems? Does existing copyright protection for computer code that operates a generative AI system provide sufficient incentives?

Peermusic believes that legal protection for some AI-generated material is required as a matter of law, so in our view this question returns to the issue of whether a change in copyright law is necessary with respect to AI-generated content; our position remains that changes in copyright law are not necessary for such content. We also believe that copyright protection is prohibited under law for AI-generated content without creative human input or intervention, and legal protection for such content is undesirable both as a matter of law and policy.

There are further policy reasons in favor of the protection of qualifying AI-assisted content. The protection of such content encourages songwriters to create freely using the tools of their choice and prevents the erosion of the value of creative works with new and overbroad exceptions to copyright. Boomy would add that not only does copyright protection bestow economic value upon a creator's output, it also gives the copyright owner powerful tools to combat illegal and other uses and distributions of AI content – uses that run strongly counter to public policy. Given the ease with which original content can be created on AI platforms, it is critical to Boomy's anti-spam, anti-abuse, and anti-disinformation efforts to ensure that critical mechanisms (such as those established under the Digital Millennium Copyright Act⁴³) to combat such content are not disabled.

⁴² *Thaler* at 10.

⁴³ 17 U.S.C. § 512

20.1. If you believe protection is desirable, should it be a form of copyright or a separate sui generis right? If the latter, in what respects should protection for AI-generated material differ from copyright?

As we believe is clear from our collective comments above, it is our understanding that certain AI-generated content is already protected under copyright. AI-generated content created without meaningful human creative involvement is not, and should not be, subject to copyright protection.

21. Does the Copyright Clause in the U.S. Constitution permit copyright protection for AI-generated material? Would such protection “promote the progress of science and useful arts”? If so, how?

The Copyright Clause requires copyright protection for materials that meet the requisite standards of originality. Further, we strongly believe that the use of AI in the creative process will provide new tools for artists, composers, writers, and producers to broaden their sights – exploring new sounds, song structures, methods of collaboration. We would note how the early AI technology most commonly known under the brand Auto-Tune began as a technical studio tool and, thanks to innovative and experimental uses by artists and producers such as Cher and T-Pain, has now become an essential creative tool in every studio. In sum, we do not believe that placing limitations on creators by limiting the sort of output we incentivize furthers the constitutional aims of copyright.

22. Can AI-generated outputs implicate the exclusive rights of preexisting copyrighted works, such as the right of reproduction or the derivative work right? If so, in what circumstances?

Peermusic understands that some have taken the position that the law around derivative works may imply that all AI output under a given model is derived from all input, whether or not any particular copyrightable work can be identified in any particular output. Peermusic believes this is a fact-specific inquiry that will require analysis in every case. However, we believe it is clear in every case that AI-generated output will always be subject to scrutiny under the substantial similarity standard as applied by the courts, and any claimant or user of output that infringes under this standard will be liable as a direct infringer.

Boomy would add that depending on the design of an AI system, it is possible that generative outputs could implicate the rights of preexisting copyrighted works, particularly considering that in practice generative AI systems are driven by humans who exercise creative control, and that creative control includes the capacity to infringe. There are technological guardrails that can and are being implemented to reduce this possibility, but any system where a user is fundamentally in control has the potential for the user to guide that system to infringe. This is why it is important to maintain and apply the standards of current copyright law.

23. Is the substantial similarity test adequate to address claims of infringement based on outputs from a generative AI system, or is some other standard appropriate or necessary?

Yes, existing law is adequate; tests to determine copyright infringement should not be modified based on the method of creation.

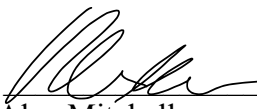
27. Please describe any other issues that you believe policymakers should consider with respect to potential copyright liability based on AI generated output.

As a general matter and in closing, peermusic would like to emphasize that while we are primarily concerned about the ability of our writers to use whatever tools they wish to use in the creative process without risking forfeiture of their right to copyright protection, we hold a broader underlying concern about the dilution and devaluation of copyright in general if suddenly the law must create and police a new “fifth category” of uncopyrightable content across all creative industries. We might ask where the robust creative industries in the United States would be today had physical copies and ultimately digital phonorecord deliveries been found not to be copyrightable reproductions of musical works, as copyrightability of new technology did not go unchallenged in either case – at the start of the 20th century and at the start of the 21st.

Boomy would offer the following closing comments. As policymakers consider important definitions, standards, and practices in this area, Boomy would like to reiterate the critical influence of humans – both the human creators and users of musical algorithms – on the process of creating music. There is now an emerging AI-enabled creative class in music, a class which deserves equal protection. An outsized focus solely on the technology involved risks ignoring the humans using that technology for self-expression. Like every other technological leap in music throughout history, the use of AI in music-making tools is a fundamentally human phenomenon. Once again, peermusic and Boomy thank the Copyright Office for its thoughtful and comprehensive Notice of Inquiry and for the opportunity to present both our respective and our shared views.

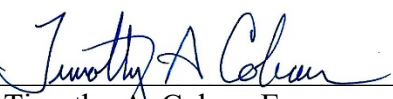
Respectfully submitted,

BOOMY, INC.

By: 

Alex Mitchell
Co-Founder and C.E.O.

PEERMUSIC

By: 

Timothy A. Cohan, Esq.
Chief Counsel