Respectfully submitted by:
Dina LaPolt, Esq.

Before the
UNITED STATES COPYRIGHT OFFICE
The Library of Congress

In the Matter of: Artificial Intelligence and Copyright

Docket No. 2023-6

COMMENTS OF DINA LAPOLT ESQ. IN RESPONSE TO THE NOTICE OF INQUIRY CONCERNING ARTIFICIAL INTELLIGENCE AND COPYRIGHT

I thank the Copyright Office (the "Office" or "you") for this opportunity to submit my comments in response to the Notice of Inquiry ("NOI") on Artificial Intelligence and Copyright, issued by the Office on August 30, 2023. I sincerely appreciate the opportunity to be a voice in support of music creators and their interests when considering the implications of this new technology and I highly regard the Office's efforts to ensure that copyright law is fairly applied, and that creators' copyrighted works are protected. I commend the Office's effort to get ahead of the potential issues that may arise with artificial intelligence and start a discussion about interpretation of existing statutory language.

My name is Dina LaPolt and I founded and own the boutique transactional entertainment law firm, LaPolt Law, P.C., which specializes in representing music creators. As a former music creator myself, I have built my practice by focusing on the music creator's perspective. I have spent my entire career advocating for my clients and the broader music creator community by participating in legislative advocacy efforts. Most recently, I passionately lobbied and was intricately involved in the ultimate passing of the Orrin G. Hatch—Bob Goodlatte Music Modernization Act in 2018, and I look forward to continuing to fight for transparency, protection, and efficiency in the creative and legal space.

Comments

I. NOI Questions #1 and #2:

#1: 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 and copyright owners?

#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?

Generative artificial intelligence ("AI") is playing an increasingly pivotal role in our modern society, introducing both benefits and challenges to the world of music. Most notably for music creators like my clients, AI presents avenues for enhanced innovation and creativity and can serve as a tool to help them build upon their creations and give suggestions for how to revise their works like a co-creator might do. In speaking with many of my clients, this is how they primarily view AI -- as a tool to be used in the creation of their musical works, no different than prior technological innovations such as Pro Tools and Ableton.

However, while AI has great potential to be used as a tool for good, it carries with it risks that also need be addressed. There is of course the ever-increasing threat of copyright infringement – both with respect to the training of AI models, rising in number, and with respect to the content that these models generate.

AI algorithms, in generating music, can inadvertently (or intentionally) produce works that are substantially similar to existing copyrighted works. With the ease and speed at which works can be created using AI, it is obvious why this is a big concern for both my clients and for music lawyers like myself, who are often tasked with policing infringements.

Further, from an AI model's inception it is likely that it will be trained on copyrighted works that are not authorized or licensed for that use. Without a proper licensing scheme to protect creators' rights, these models are unacceptably being built off the backs of creators' works – and the companies building them are setting themselves up to profit off the result of this unauthorized usage in the billions[1].

Finally there is an imminent concern amongst my clients, which has also been at the forefront of the recent Writers Guild of America (WGA) and Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) strikes[2], that if AI can mimic an artist's voice, image and/or likeness to the point that it is impossible to distinguish between the human and the replica, creators may be at risk of being replaced entirely by AI, and worse, they are at risk of their very identity being hijacked and profited on by anyone with access to these systems. This is a serious threat to creators, and we are already seeing the devastating potential effects of this play out[3].

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[1] *Generative AI to Become a $1.3 Trillion Market by 2032, Research Finds*, Bloomberg (June 1, 2023), https://www.bloomberg.com/company/press/generative-ai-to-become-a-1-3-trillion-market-by-2032-research-finds/

[2] Gene Maddaus, *SAG-AFTRA Strike: AI Fears Mount for Background Actors*, Variety (July 25, 2023, 9:44 AM), https://variety.com/2023/biz/news/sag-aftra-background-actors-artificial-intelligence-1235673432/

[3] Helen Mort, *I felt numb – not sure what to do. How did deepfake images of me end up on a porn site?*, The Guardian (Oct. 28, 2023, 5:00 PM), https://www.theguardian.com/technology/2023/oct/28/how-did-deepfake-images-of-me-end-up-on-a-porn-site-nfbntw

II. NOI Question #5: Is new legislation warranted to address copyright or related issues with generative AI?

No.

Current Copyright Law and established case law are sufficient to address any issues with this, and as such, there is no need for new legislation tailored to AI in this respect. This response paper will address the potential issues we anticipate with respect to copyright law and how existing legislation is sufficient in each instance.

However, as discussed later in this response paper, I do believe new legislation is warranted to address the lack of nationwide protection against unauthorized replication and use of image, likeness, and notably for my clients, voice. AI technology is advancing quickly, and we need federal protection for these rights as soon as possible.

III. NOI Questions #8, #8.3 and #8.5:

#8: **Under what circumstances would the unauthorized use of copyrighted works to train AI models constitute fair use? Please discuss any case law you believe relevant to this question.**

#8.3: **The use of copyrighted materials in a training dataset or to train generative AI models may be done for noncommercial or research purposes. How should the fair use analysis apply if AI models or datasets are later adapted for use of a commercial nature?**

#8.5: **Under the fourth factor of the fair use analysis, how should the effect on the potential market for or value of a copyrighted work used to train an AI model be measured? Should the inquiry be whether the outputs of the AI system incorporating the model compete with a particular copyrighted work, the body of works of the same author, or the market for that general class of works?**

I believe it is ***inappropriate in any circumstance*** to apply the fair use doctrine to the use of copyrighted works to train AI models.

First and foremost, "fair use" is a defense to an infringement claim. There is no fair use without a violation of copyright law. Fair use is decided by courts on a case-by-case basis and hinges on heavily fact specific circumstances in each case. To deem something as fair use is to take away a copyright owner's sovereignty over their own creative works and impede their ability to protect and enforce their copyright rights leading to the diminution of their rights and the decreased value of their works.

Andy Warhol Foundation v. Goldsmith [4]("Warhol") is the most recent and most relevant case law to inform our analysis here. This case revolved around Warhol's use of a copyrighted work, specifically, a photograph initially taken by professional photographer Lynn Goldsmith that was commissioned for publication by *Newsweek* in 1981 in connection with a news article featuring the up-and-coming musical artist, Prince. *Vanity Fair* later licensed the photo for a one-time only use and hired Andy Warhol to create a silkscreen portrait of the photo to appear with an article about Prince in its November 1984 issue. Goldsmith was credited for the "source photograph" and paid a license fee for this use. Following

[4] *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023).

Prince's death in 2016, Conde Nast licensed the same image from Andy Warhol's estate that had been produced as a silkscreen portrait in a different color. Goldsmith had not authorized or licensed the photo for any uses in addition to the initial use by *Newsweek* and the subsequent one-time use by *Vanity Fair.* Although the lower court initially ruled that Warhol's unauthorized use of the photograph was transformative enough to constitute "fair use," the Supreme Court rightfully took a more stringent stance because the purpose of the uses were substantially the same. More simply put, Conde Nast and Warhol should have licensed the use of the photo, the underlying copyrighted work, from the copyright owner as *Vanity Fair* had done years earlier. Even when the style and appearance of the work has been altered, if the new work and the original work "share substantially the same purpose"[5] then simple stylistic changes are not enough to warrant the fair use defense. The output must be more than transformative in appearance, it must also be transformative in purpose. In Warhol, the purpose of the infringing use is the same as the original photograph – "to illustrate a magazine about Prince with a portrait of Prince."[6] Justice Sotomayor added that "to hold otherwise would potentially authorize a range of commercial copying of photographs, to be used for purposes that are substantially the same as those of the originals."[7]

The decision in the Warhol case focused on the idea that in the marketplace a competing work would reduce the value of the original work. Similarly here, the purpose of copying when training AI models is at its core to generate new competitive works, so in my opinion, there is no amount of transformation that can justify the use of these works as fair use. The whole purpose is to create new works to compete directly with the original works.

However, I must note that while Warhol focused on competition in the marketplace, courts should not consider solely whether the model is currently or is intended to be commercial in nature, because the reality is that once the model has been trained, there will be users who put it to use in a commercial context, even if that is explicitly against the wishes of the developers. All AI models have the potential to be used commercially and therefore a presumption of commerciality should be applied. Moreover, should the developers decide to later make their model commercially available, the practical implications of licensing on a retrospective basis will be challenging and impractical.

For these reasons, I strongly believe that any use of a copyrighted work to train an AI model should not evoke fair use, and instead, developers should be forthcoming with their intentions and negotiate with rightsholders for proper permission and compensation for the use of copyright protected works.

IV. NOI Questions #9 & #9.1:

#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)?

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

Utterly Yes – copyright owners should always have to affirmatively consent (opt in).

Consent must be required for **ALL** uses of copyrighted works to train AI models. Whether a use is commercial or non-commercial should not be a consideration. Copyright law does not look at whether a

[5] *Id*. at 1273.
[6] *Id*. at 1284.
[7] *Id*.

use is commercial or non-commercial when determining copyright infringement[8]. As discussed previously, use of copyrighted works without permission is copyright infringement – and even though the fair use defense considers whether a use is commercial or non-commercial, this should only be considered when determining if the defense applies and should not be used as a reason to forgo permission from the start.

We have already seen the shortcomings of what is essentially an "opt-out" system when we consider the DMCA, specifically with what we've seen with platforms such as YouTube and social media sites. It is like a game of whack-a-mole trying to keep infringing works down off these platforms as the platforms themselves are not controlled by the creators and are not directly liable for infringements caused by its users. When the burden of disapproving use is placed on the creators this will always result in rampant infringement. The burden of getting affirmative approval must fall in the hands of those who are ultimately trying to benefit from the use – the AI developers.

Thus, I staunchly oppose any consideration of changes to the law that would create an opt-out system for AI training. Such potential changes would exacerbate problems already faced by copyright owners when it comes to protecting their copyrighted works online.

V. NOI Question #10.1: Is direct voluntary licensing feasible in some or all creative sectors?

As a general matter, I am in strong support of direct licensing and believe it is feasible, especially in the music industry. The only way to ensure copyright owners are able to negotiate in a truly free market and obtain the full value of their works is through direct licenses. The music industry is already structured to provide these kind of licenses on a large-scale basis in the free market. There is well-established precedent for such voluntary, market-based licenses[9] and the music industry is more than equipped to negotiate directly. Moreover, this is extremely important in the early days of AI licensing to allow the market to determine the true value of the works.

VI. NOI Question #10.2: Is a voluntary collective licensing scheme a feasible or desirable approach?

A voluntary collective licensing ("VCL") scheme may be an approach that some copyright owners shift towards as direct licensing progresses, however it may not be the right approach for all industries and in any case, it should only be looked at as an option once the market has stabilized. Such a scheme has been employed in the music industry already, where collection societies manage rights related to public performance and mechanical reproduction, and it may be a desirable licensing approach for creators who are independently published without a professional publisher representative handling their licensing. However, unlike the current schemes for public performance, it is extremely important that these licensing collectives only be established once the market has determined the value of the works – and that value must be able to be reflected in any VCL. With a VCL approach, licensing terms, pricing

[8] *See* 17 U.S.C.A. § 501(a)-(b) (indicating there are only two elements to prove infringement: "1. the plaintiff is the owner of a valid copyright; and 2. the defendant copied original expression from the copyrighted work.")
[9] Molly Schuetz, *Warner Music, TikTok Sign Expanded Licensing Agreement*, Bloomberg (July 18, 2023, 7:17 AM), https://www.bloomberg.com/news/articles/2023-07-18/warner-music-tiktok-sign-expanded-licensing-agreement?leadSource=uverify%20wall. *See also* Jem Aswad, *Facebook and Universal Music Group Strike Global Licensing Agreement*, Variety (Dec. 21, 2017, 8:07 AM), https://variety.com/2017/biz/news/facebook-and-universal-music-group-strike-global-licensing-agreement-1202647136/.

models, and usage policies can become more standardized, providing clarity to both copyright owners and AI developers, and may help provide access to works that may not be represented by a major publisher or major label. Further, they can represent the interests of a large group of copyright owners, giving them a voice in negotiations, policymaking, and setting industry standards. However, it is essential that they remain completely voluntary and have methods for copyright owners to remove their works from the catalog at any time. Careful consideration must also be given to clearly defining the scope and limitations of the license, particularly for evolving technologies like AI.

So while a VCL has potential benefits and may be a feasible approach in the future, its implementation would require surgical planning and broad stakeholder consultation to address the concerns and needs of both copyright owners and creators and should not be the front line method of licensing in the beginning.

VII. NOI Question #10.3: Should Congress consider establishing a compulsory licensing regime?

NO.

Under no circumstance should Congress consider establishing a compulsory licensing regime. Compulsory licenses have never provided an adequate level of compensation like a direct license would and do not allow for the creative control that is essential to our clients.

VIII. NOI Question #10.4: Is an extended collective licensing scheme a feasible or desirable approach?

No.

An extended collective licensing scheme allows for licenses to be granted for rights not held by any of the members of the collective society – specifically rights held by "unknown" owners. This approach is ripe for abuse as it incentivizes societies to turn a blind eye when licensing and profit from unrepresented creators. This is essentially an "opt-out" system that as previously discussed should not be applied.

IX. NOI Question #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?

Yes, there are numerous circumstances when a human using a generative AI system should be considered the "author" of the material produced by the system. Existing legal concepts of human authorship apply to a creator's interaction with generative AI. *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.* recognizes an "extremely low" threshold for human effort, stating further that "The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be."[10] In other words, there is almost no amount of human involvement too low to garner

[10] *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)

protection, as long as the human possesses a "creative spark" this should be enough. For a music artist specifically, every lyric and melody they write is derived from an innately human emotional place – this is the key to moving the creative process forward – whether that is using AI or not, humans uniquely understand how to put words to a feeling – and it takes a human to feel those emotions in the first place.

With respect specifically to music, copyright law already allows protection to be given for the selection and arrangement of otherwise unprotectable elements, as is the case for derivative works. For example, a work that contains "preexisting works" (e.g. works that were previously registered or in the public domain) can be registered as a derivative work, and the new registration will extend to "the selection, coordination or arrangement of those works."[11]

The creator community has long used technology in the creation of their works and already is using AI in the creation of works today. When a creator uses AI like a new-age instrument, like Ableton, or a VST in Pro Tools, and is guiding its outputs, then this is no different than playing a complex synthesizer. The music AI generates with the producer's guidance should belong to said producer. After all, when Buddy Guy plays a guitar, nobody says the guitar co-wrote the song he creates. The difference is now, unlike when Buddy Guy was creating music, producers and artists no longer have to pay huge amounts of money to get musicians in a room together, with software like Pro Tools creation of music is infinitely more accessible. Generative AI is further expanding this accessibility to even more creators. These examples fall squarely within accepted concepts of human authorship over works that incorporate unprotectable elements.

X. NOI Question #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?

No revisions are necessary.

As discussed in my answer to question 18, there are already legal concepts in place that apply when a creator uses technology, of which AI is no different. Any standards set forth will quickly become outdated as the speed at which technology grows and adapts is exponential. As noted so aptly in *Feist*[12], as long as there is a human involved giving that "creative spark," then this should be the only standard needed. What constitutes a "creative spark" is a determination so fact specific only the courts should be tasked with such a burden. For example, a user inputting a simple generic prompt such as "write me a pop song" and not doing anything further with the output would likely not rise to the level of protectability required for copyright protection as the human element is not sufficiently original or creative. However, were a user to use more creativity when prompting the AI program such as by adding details to the creative story they want to tell or by modifying and arranging the output to better reflect their creative vision, this could rise to meet the standard of the "modicum" of creativity required.

It is also worth noting that for registration purposes, in order to keep this process accessible and easy to understand by the common citizen, the standard for protection must be easy to comprehend. Creators need not have advanced technical knowledge of the tools they use in order to determine whether they can receive a copyright. All they should have to know is that their uniquely human "creative spark" was used in their creation.

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[11] 17 U.S.C.A. § 1303
[12] *Feist*, 499 U.S.

XI. NOI Question #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?

Absolutely, if AI is trained using a specific work, the exclusive right of reproduction may be implicated, and if the AI then produces a work that is substantially similar to the original, the derivative rights of the copyright owner would also be implicated. This is why it is imperative that there is transparency, tracking and labeling in connection with the training of AI. Otherwise, as will be discussed further below, it would only make sense to apply a presumption of accessibility to AI and its developers as anyone can access almost anything on the internet these days and we know it is common for AI to be trained on existing digital information and works found on the internet.

XII. NOI Question #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?

No other standard is necessary – the existing substantial similarity test is adequate.

XIII. NOI Question #24: How can copyright owners prove the element of copying (such as by demonstrating access to a copyrighted work) if the developer of the AI model does not maintain or make available records of what training material it used?

Firstly, adequate record keeping should be a requirement for all AI developers using existing works to train their models. The burden should be on the developers, as the benefactor of the model, to know what was used to train the model.

However, in the absence of recordkeeping, a presumption of accessibility should be applied. Machine learning is so powerful that when granted access to the internet, virtually all available works could be implicated by the training, therefore there is really no question as to whether the model had access to a particular work or not – as long as that work is publicly available on the internet. This presumption would encourage AI developers to keep actual records in order to prove that there in fact was not access.

XIV. NOI Question #25: If AI-generated material is found to infringe a copyrighted work, who should be directly or secondarily liable—the developer of a generative AI model, the developer of the system incorporating that model, end users of the system, or other parties?

This is ultimately a very fact-dependent determination and should be left to the courts to explore on a case-by-case basis. If it can be shown that an AI model was trained on a work and then produced an infringing derivative, then the platform should be liable. Developers must have the burden of ensuring the algorithms guiding the products they develop are not pumping out infringing content. This is essential to address from the beginning. We cannot have another DMCA on our hands where the industry is forced to pressure tech companies for decades to come to develop and implement copyright safety values for their products that should have included them from the get go.

Additionally, principles of direct, vicarious, and contributory liability may also come into play, and should any party meet those existing standards then liability would be appropriate. For example, even

if an AI model is shown to have accessed a copyright work and ultimately spit out an infringing derivative, if the user who decides to exploit that derivative knew that the work was infringing, liability on the user would be proper. Say the user asks AI software to help write lyrics to a song in the style of Drake, and then incorporates a line from one of his most famous songs, the user has thus induced or caused the infringing activity and knows the lyric is from the popular song. Therefore, even if the user did not make any change at all to the AI lyrics, by directing the program to produce lyrics similar to Drake, they would be contributorily liable.

The user need not necessarily even know the activity is infringing like the example above to be found vicariously liable. For vicarious liability, the user only needs to have the right and ability to control the infringing action and have a direct financial benefit from the infringing activity.[13] For example, even if the user did not know of the original Drake song that the infringing lyrics were taken from, as long as the user has control over the ultimate song they end up exploiting, they have the ability to control the ultimate outcome of the program. Further, the creator has the ability to ask the AI to revise the lyrics and the ability to continue to make changes after using the program before any further use of the song. They even have the ability to not use or exploit the AI output at all. In the event they were to exploit the new song with the infringing lyrics, then they could be vicariously liable.

XV. NOI Question #30: What legal rights, if any, currently apply to AI-generated material that features the name or likeness, including vocal likeness, of a particular person?

The use of AI-generated material that features the name or likeness, including vocal likeness, of a particular person may engage multiple areas of U.S. law, including but not limited to: right of publicity, defamation, false light and other privacy rights, among other areas, including copyright. However, the issue is that there does not exist sufficient federal protections for these some rights, and inconsistency in state law places undue burden on rights holders trying to police unauthorized materials disseminated online.

XVI. NOI Question #31: Should Congress establish a new federal right, similar to state law rights of publicity, that would apply to AI-generated material? If so, should it preempt state laws or set a ceiling or floor for state law protections? What should be the contours of such a right?

Yes.

It is essential that congress establish a new federal right addressing AI-generated material that uses personal likenesses. As previously mentioned, a federal right is needed to create a consistent national framework – currently only a little over half of U.S. states recognize a right of publicity and the right varies greatly among these states resulting in inconsistency across the nation.[14] With AI and digital content often crossing state borders, a uniform law can prevent conflicts and complexities. Practically, this also makes it more difficult for creators' lawyers like myself to shut down deepfakes of our clients, being forced to call upon laws that were not intended to address the kind of issues we are facing now.

[13] 17 U.S.C. § 20

[14] Mark Roesler and Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, American Bar Association (Sept. 16, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/

It is important that any potential federal right protecting voice and likeness set a "floor" of fundamental rights such that states can be individualized in their approach to cater to the potentially more stringent wishes of their residents. This floor, however, is essential to secure the right to legal action against unauthorized uses created with AI, no matter where an individual lives.

Also, it is critical for the purposes of AI for the federal right of voice and likeness to cover not only use in commerce, but also reputation damaging, fraudulent, and criminal uses as well. People should not live in fear of the next deepfake video becoming viral leading fans to question their morals or personal views – and the public should be protected from misleading videos that flood the internet with misinformation. This technology is getting to the point where these fakes are indistinguishable from the real thing and lawyers need a clear framework for combating their spread.

I support the current discussion draft introduced by Sen. Chris Coons (D-Del.), Sens. Marsha Blackburn (R-Tenn.), Thom Tillis (R-N.C.) and Amy Klobuchar (D-Minn.).[15] The proposed legislation, called the Nurture Originals, Foster Art, and Keep Entertainment Safe Act, or NO FAKES Act, would give individuals whose voice or image has been imitated by AI without their consent, the right to sue both the user who created the AI imitation, as well anyone that knowingly hosted, published or distributed it. This discussion draft of course leaves some things to be desired, however, it is an important first step in the process.

XVII. NOI Question #32: Are there or should there be protections against an AI system generating outputs that imitate the artistic style of a human creator (such as an AI system producing visual works "in the style of" a specific artist)? Who should be eligible for such protection? What form should it take?

There are currently laws in place that would be implicated if an AI program allows users to prompt the system to generate output by using the name of a specific artist. Specifically, rights of privacy (and publicity) and the Lanham Act could apply here. If the AI system is commercialized in any way, or arguably if the output is intended to be commercialized, the use of a person's name would be a violation of their trademark (should they have one federally registered) and their rights of publicity and privacy – specifically misappropriation of their name or likeness. Even absent a trademark, most states have right of privacy laws, and you can prove misappropriation if: "1) you didn't grant permission for the use of your identity (e.g. a person's name); 2) the defendant utilized some protected aspect of your identity; and 3) the defendant used your identity for their immediate and direct benefit."[16] So an AI system allowing the use of a person's name without their permission for their immediate gain would violate their rights of privacy. Similarly, the Lanham act would be violated if that person's name is a federally registered trademark.

XVIII. NOI Question #33: 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?

While Section 114(b) of the Copyright Act limits the exclusive rights of sound recording copyright owners such that their exclusive rights do not extend to an independent sound recording that

[15] *Rights of Publicity Bill Would Federally Regulate AI-Generated Fakes*, JD Supra (Oct. 24, 2023), https://www.jdsupra.com/legalnews/right-of-publicity-bill-would-federally-4108699/#:~:text=The%20proposed%20NO%20FAKES%20Act,flood%20of%20AI%2Dgenerated%20replicas

[16] *Invasion of privacy: Appropriation*, *Findlaw* (August 03, 2023), https://www.findlaw.com/injury/torts-and-personal-injuries/invasion-of-privacy--appropriation.html

imitates or simulates the copyrighted work[17], there is actually no conflict between this limitation and current (and proposed) right of publicity laws. Copyright law protects the sound recording itself – publicity laws in contrast protect the commercial use of an individual's name, image, likeness, or, in some cases, voice.

For example, if AI were to generate a new recorded piece of music that mimics an artist's voice without having used the actual recorded audio of that artist's voice, right of publicity laws could be invoked to argue that the AI-generated voice is using and exploiting the singer's vocal likeness without permission. There is no copyright infringement in this scenario with respect to a sound recording because there was no use of an existing sound recording. If that AI system were to take an existing sound recording of an artist's voice and reproduce it in any manner, this would violate Section 114(b) because the actual audio of the recording is being used. So, the different scenarios and availability of right of publicity and copyright laws offer different causes of action to those whose rights are being infringed, and most importantly in the scenario where an existing sound recording was not used there is still a cause of action that can actually be pursued with a right of publicity which is the utmost importance to the protection of artist's careers.

As I have noted throughout this paper, adjustment need not be made to copyright law to rectify any perceived conflict, as ultimately, the concern here is not the copying of the recording itself, which is protected under current copyright law, it is the effect the new work has – specifically the mimicry of the artist's personality characteristics themselves. Both laws can exist without conflict. This is yet another reason why a federal right of publicity is so important to have full protection for the rights and interests of creators.

Conclusion

I thank the Office for focusing its attention on the numerous considerations surrounding this exciting new technology and how we can best support creators while protecting their original works. Music creators remain the most essential piece of the music industry and are often pushed aside when big tech sets its sights on copyright law. Accordingly, I urge the Office to continue to work to protect the rights of copyright holders and creators while at the same time fostering growth within the industry.

Thank you for your time and consideration.

Respectfully submitted,

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[17] 17 U.S.C.A. § 114