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Fake Drake? AI Music Generation Implicates Copyright and the Right of Publicity

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FAKE DRAKE? AI MUSIC GENERATION IMPLICATES COPYRIGHT AND THE RIGHT OF PUBLICITY

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Abstract: Artificial intelligence has contributed to music composition since the 1950s. Its contributions evolved from machines that produced simple melodies to programs that generate accurate vocal imitations of singers. Modern artificial intelligence relies on pre-existing—and often copyrighted—songs to create new music, the most common of which include vocal imitations of popular singers. Copyright law in the United States has yet to address how copyright holders' rights are implicated when artificial intelligence programs are trained on protected works. As a result, these rights holders across disciplines and sectors have filed complaints alleging infringement of their works. While copyright holders await their fate, singers whose voices are imitated by artificial intelligence soundalikes should look to another source of protection: the right of publicity. This right strikes the balance of providing relief for singers while allowing artificial intelligence music generation to develop as a tool for musicians. This Comment examines the current landscape of U.S. copyright law as it pertains to music and identifies areas lacking and affording protections for copyright holders. Copyright law will then be applied to the AI-generated soundalike song, "Heart on My Sleeve." Due to the uncertainty surrounding copyright protections, this Comment proposes that singers should turn to the right of publicity. Recognizing that this is an imperfect solution given the current patchwork of state laws providing this right, this Comment proposes a framework for a federal right of publicity.

INTRODUCTION

Artificial intelligence's (AI) contributions to music date back to 1951 when Alan Turing, the father of modern computer science, created a machine that produced three simple melodies.[1] By 1995, David Bowie began generating lyrics with a Mac application that randomized lyrics from an input of about twenty sentences.[2] Two years later, computers

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1. Andrew R. Chow, '*There's a Wide-Open Horizon of Possibility.' Musicians are Using AI to Create Otherwise Impossible New Songs*, TIME (Feb. 5, 2020), https://time.com/5774723/ai-music/ [https://perma.cc/HJ4W-T4T8].

2. *Id.*; Matthew Braga, *The Verbasizer was David Bowie's 1995 Lyric-Writing Mac App*, VICE (Jan. 11, 2016), https://www.vice.com/en/article/xygxpn/the-verbasizer-was-david-bowies-1995-lyric-writing-mac-app?callback=in&code=ZDLHNTMZY2ITZDQXNS0ZMWVJLWIWNTQTYJRHZTYYYTQYMGY2&state=b363f266c3a143f4991034dbc52915af [https://perma.cc/E2XS-KK9V].

mimicked the composition style of Baroque musician Johann Sebastian Bach so accurately that audiences were unaware the composition was not Bach's work.[3] By 2016, AI systems generated full-length songs that attempted to mimic popular musical artists, although compositions at this stage struggled to meaningfully mimic the styles of such artists.[4] In recent years, AI music has made immense strides. AI led to the creation of virtual rapper FN Meka and eerily accurate imitations of musicians such as Elvis Presley, Frank Sinatra, and Michael Jackson.[5] These AI-generated soundalikes implicate artists' copyright protections and reputations throughout their lifetimes and after death.

AI, the technology used to make these musical advances possible, utilizes algorithms to train itself as it is exposed to more data.[6] Machine-learning music generation trains AI on raw audio to create music that resembles the qualities of artists and genres using variational autoencoders (VAEs).[7] VAEs compress sequences of raw audio and are analyzed by AI to build samples from the ground up.[8] The AI then decodes the samples back into raw audio to produce a song.[9] Machine-learning generated music can mimic the voices and musical styles of the raw audio that is provided to the technology as an input, causing many AI-generated sound recordings to flood social media and streaming platforms.[10] For example, "Heart on My Sleeve," a 2023 AI-generated song that mimicked

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3. George Johnson, *Undiscovered Bach? No, a Computer Wrote It*, N.Y. TIMES (Nov. 11, 1997), https://www.nytimes.com/1997/11/11/science/undiscovered-bach-no-a-computer-wrote-it.html?mtrref=www.google.com&gwh=9AFD6DB51EBAE5B8BFE75E167CC9E502&gwt=pay (last visited Aug. 1, 2024).

4. Chow, *supra* note 1.

5. *See* Marc Tracy, *A 'Virtual Rapper' Was Fired. Questions About Art and Tech Remain.*, N.Y. TIMES (Sept. 6, 2022), https://www.nytimes.com/2022/09/06/arts/music/fn-meka-virtual-ai-rap.html (last visited Aug. 1, 2024); Joe Coscarelli, *Capitol Drops 'Virtual Rapper' FN Meka After Backlash over Stereotypes*, N.Y. TIMES (Aug. 23, 2022), https://www.nytimes.com/2022/08/23/arts/music/fn-meka-dropped-capitol-records.html (last visited Aug. 1, 2024); Jonathan Chadwick, *Elvis Back from the Dead? Artificial Intelligence is Used to Create Eerie 'Deepfake' Pop Songs that Sound Like They Are Being Sung by Deceased Stars*, DAILY MAIL (Nov. 10, 2020, 11:37 PM) https://www.dailymail.co.uk/sciencetech/article-8933235/AI-creates-deepfake-songs-sound-like-theyre-performed-deceased-pop-stars.html [https://perma.cc/2ZZS-TSHS].

6. Sara Brown, *Machine Learning, Explained*, MIT SLOAN SCH. MGMT. (Apr. 21, 2021), https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained [https://perma.cc/5DE4-RN8D].

7. Eric Sunray, *Sounds of Science: Copyright Infringement in AI Music Generator Outputs*, 29 CATH. U. J.L. & TECH. 185, 192 (2021).

8. *Id.*

9. *Id.*

10. Chloe Veltman, *When You Realize Your Favorite New Song Was Written and Performed by . . . AI*, NPR (Apr. 21, 2023), https://www.npr.org/2023/04/21/1171032649/ai-music-heart-on-my-sleeve-drake-the-weeknd [https://perma.cc/H44A-ERXP].

the voices of Drake and the Weeknd, quickly rose to popularity and triggered copyright concerns within the music industry.[11]

The U.S. Copyright Act of 1976 affords composers, musicians, and music publishers protections for their musical creations.[12] This includes the right to create new works; the right to make, sell, and distribute copies; and the right to publicly perform their works.[13] When a copyright owner inputs their music into an AI program to generate a new work—whether lyrics or entire sound recordings—they gain a new tool in their artistic toolbox.[14] But what if a third party does the same? Courts have yet to address this issue. If courts hold that the use of copyrighted inputs constitutes infringement, there may be a chilling effect on AI music generation as a whole. Alternatively, if courts find that this use is not infringing, rights holders may lose control over their works and fail to receive compensation for the use of their works.

Vocal artists are faced with the added concerns of privacy, dilution of their image, and a lack of compensation.[15] Even if courts reject a finding of infringement when inputs are copied into AI, some copyright holders may still find relief. Singers whose voices are mimicked in AI soundalikes, like Drake and the Weeknd in "Heart on My Sleeve," may turn to the right of publicity to protect the use of their voice.[16] The right of publicity "is the inherent right of every human being to control the commercial use of his or her identity."[17] Courts notably protected singers' voices under the right of publicity in 1988 with *Midler v. Ford Motor Co.*,[18] followed by *Waits v. Frito-Lay Inc.*[19] in 1992. In both cases, the Ninth Circuit found that using vocal imitations of popular singers for

11. Joe Coscarelli, *An A.I. Hit of Fake 'Drake' and 'The Weeknd' Rattles the Music World*, N.Y. TIMES (Apr. 24, 2023), https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html (last visited Aug. 1, 2024).

12. *See* 17 U.S.C. § 106.

13. *Id.*

14. Complaint at 2, UMG Recordings, Inc. v. Suno, Inc., No. 1:24-cv-11611 (D. Mass. June 24, 2024) [hereinafter *Suno* Complaint].

15. *See* Maria Sherman, *Miranda Lambert, Billie Eilish, Nicki Minaj Submit Letter to AI Developers to Honor Artists' Rights*, ASSOCIATED PRESS (Apr. 2, 2024), https://apnews.com/article/ai-open-letter-billie-eilish-miranda-lambert-nicki-minaj-9cd5f32f692d83e75b9c3b3da1554b6f [https://perma.cc/EB4F-WZUY].

16. *See, e.g.*, Sara Asher, *A Federal Right of Publicity to Navigate the Wild West of Generative AI Content*, 36 ST. THOMAS L. REV. 105, 124 (2024) (proposing a federal right of publicity framework tailored to generative AI).

17. J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2019).

18. 849 F.2d 460, 462 (9th Cir. 1988).

19. 978 F.2d 1093 (9th Cir. 1992).

commercial uses amounted to misappropriation of their voices.[20] However, this right is limited for several reasons. First, the right of publicity in the music realm protects only the performer, rather than the rights holder of the underlying musical composition.[21] Second, while the right of publicity can protect individuals, it fails to protect communities that may be stereotyped or culturally appropriated.[22] The right of publicity applies to aspects of an individual's personality, focusing on the individualized impact of identity or personality misappropriation.[23] Thus, the individualistic focus of right of publicity laws leaves aspects of a community's shared identity unprotected. Finally, and most pertinent here, a patchwork of state laws governs the right of publicity. Although the U.S. Supreme Court recognized a state-law right of publicity in the 1977 case *Zacchini v. Scripps-Howard Broadcasting Co.*,[24] the right of publicity has not been adopted by statute or common law federally.

As a result, right of publicity laws vary from state to state,[25] with fifteen states not recognizing the right at all.[26] Where publicity laws do exist, they vary dramatically in scope and application. Indiana, for example, has a broad right of publicity that extends to personality, name, likeness, signature, voice, image, gestures, appearances, and mannerisms.[27] New York, on the other hand, limits protection to name, portrait, picture, and

20. *See Midler*, 849 F.2d at 463; *Waits*, 978 F.2d at 1112.

21. Because the right of publicity protects the use of one's identity, it does not implicate infringement of the underlying work.

22. Capitol Records received backlash for creating virtual rapper, FN Meka, for cultural appropriation. *See* Tracey, *supra* note 5.

23. *See* Ali v. Playgirl, Inc., 447 F. Supp. 723, 728 (S.D.N.Y. 1978) ("The distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or 'persona'").

24. 433 U.S. 562 (1977).

25. *See, e.g.*, IND. CODE §§ 32-36-1-7–15 (recognizing an expansive right of publicity that includes protections for personality, name, likeness, signature, voice, image, gestures, appearances, and mannerisms with extensive remedies); N.Y. CIV. RIGHTS § 51 (providing protections under the right of publicity for only name, portrait, picture, and voice). *See also* Winter v. DC Comics, 69 P.3d 473, 477 (Cal. 2003) (applying the "transformative use" test which considers whether the use of a plaintiff's personality is a "significant expression" or a "literal depiction or imitation"); Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003) (applying a "predominant use" test to protect against the use of one's personality for commercial purposes).

26. Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, AM. BAR ASS'N (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/?login#6 (last visited Aug. 3, 2024).

27. IND. CODE § 32-36-1-7.

voice.[28] In determining whether the right of publicity has been violated, California uses the transformative use test, whereas Missouri rejects that test in favor of the predominant use test. [29] To address this patchwork of state laws, Congress should utilize its Commerce Clause powers to enact a federal right of publicity that preempts existing state right of publicity frameworks.[30]

This Comment proceeds in four parts. Part I provides an overview of copyright law and explains the U.S. Copyright Act generally and protections applicable to music. Part II analyzes the specific copyright challenges implicated by AI-generated works and applies these challenges to the "Heart on My Sleeve" example. Part III analyzes the implications of applying copyright law to AI-generated soundalikes. Part IV discusses the more certain solution of the right of publicity and proposes a federal statutory framework for this right.

I. EXISTING PROTECTIONS UNDER THE COPYRIGHT ACT

The U.S. Copyright Act provides the framework for American copyright law.[31] Copyright is governed by federal statutes and rights created under Congress's Article I, Section 8 power with the purpose of promoting scientific and artistic progress.[32] As such, the Copyright Act provides a means for musicians and other artists to protect their works.[33] To provide an understanding of how AI-generated soundalikes implicate intellectual property (IP) rights, this Part discusses the U.S. Copyright Act generally, protections for music under the Copyright Act, the right to create derivative works, and copyright infringement.

A. A Primer on the Copyright Act

The Copyright Act provides rights to owners of original works. Copyright protection exists for "original works of authorship fixed in any

28. N.Y. CIV. RIGHTS § 51.

29. *Winter*, 69 P.3d at 479; *Doe*, 110 S.W.3d at 374.

30. The Commerce Clause affords Congress the power to enact a right of publicity because infringing acts are frequently disseminated through the Internet, television, and radio—forms of media that are dispersed across states. *See* Gonzales v. Raich, 545 U.S. 1, 16–17 (2005) (discussing Congress's authority to "regulate the channels of interstate commerce," "authority to regulate and protect the instrumentalities of interstate commerce," and power to "regulate activities that substantially affect interstate commerce").

31. 75A N.Y. JUR. 2D, LITERARY AND ARTISTIC PROPERTY § 2 (2023).

32. *Id.*

33. *See* 17 U.S.C. § 102.

tangible medium of expression."[34] To meet the element of originality, the work must be an independent creation and incorporate a level of creativity.[35] The Copyright Act enumerates eight copyrightable subject matters: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."[36] For a work to be fixed in a tangible medium, it must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[37] Copyrightable material in these tangible forms must be an original expression rather than a mere idea.[38] As such, authors or creators may obtain protections for their unique expression of common ideas or facts.[39]

Initial copyright ownership is afforded to the author of a work.[40] Copyright owners have the exclusive right to make, sell, and distribute copies of their work; the right to create derivative works; and the right to publicly perform and display the work.[41] Thus, copyright owners retain significant rights over their works.

B. The Copyright Act and Music

The Copyright Act enumerates protections for music as "musical works" and "sound recordings."[42] The statute's protection for musical works extends to the underlying musical composition, whereas sound recording protections refer to recorded performances.[43] Musical works include the melody, harmony, and rhythm, as well as any accompanying

34. *Id.* § 102 (a).

35. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 348 (1991).

36. 17 U.S.C. § 102.

37. *Id.* § 101.

38. *Id.* § 102(b).

39. *See Feist*, 499 U.S. at 348–50 (holding that while raw facts may be copied, a copyright holder's selection and arrangement of facts may be protected).

40. 17 U.S.C. § 201(a).

41. *Id.* § 106.

42. *Id.* § 102.

43. Mark R. Carter, *Applying the Fragmented Literal Similarity Test to Musical-Work and Sound-Recording Infringement: Correcting the Bridgeport Music, Inc. v. Dimension Films Legacy*, 14 MINN. J.L. SCI. & TECH. 669, 676 (2013).

lyrics.[44] For the purposes of copyright, owners of musical works are typically composers and music publishers.[45] Copyright protection for sound recordings combats the infringement of fixed sounds, which is a significant burden for performers and recording artists. Sound recordings are "works that result from the fixation of a series of musical, spoken, or other sounds."[46] The sound produced by a performer's rendition of a composition—how it is sung, played, or arranged—is copyrightable.[47] Rights holders of sound recordings, often the record company with which an artist contracts, receive protections for their works, including the exclusive right to reproduce these sound recordings.[48]

Musical works and sound recordings are often owned separately.[49] For example, if a songwriter composes a song, they can obtain a copyright over that musical composition as a musical work. If another musician chooses to record that same song, they may obtain a copyright for their specific recorded performance as a sound recording. So, a single piece of music often involves multiple copyright holders.

C. The Right to Create Derivative Musical Works and Sound Recordings

Musicians, like all copyright holders, retain the exclusive right to create derivative works.[50] Derivative works are those created based on a pre-existing work.[51] For music, derivative works may include musical arrangements, sound recordings, or other modifications that create an original work of authorship.[52] A copyright owner's right to create derivative works allows for protection when a work is recast, transformed, or adapted.[53] For example, karaoke music tracks independently produced

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44. Kristen H. Strickland, *"It's Still Rock and Roll"—But Are Its Chord Progressions Copyrightable and Subject to an Infringement Claim or Are They Unprotected Scènes à Faire?*, 45 AM. J. TRIAL ADVOC. 157, 157 n.1 (2021).

45. Stuart Talley, *Performance Rights in Sound Recordings: Is There Justification in the Age of Digital Broadcasting?*, 28 BEVERLY HILLS BAR ASS'N J. 79 n.89 (1994).

46. 17 U.S.C. § 101.

47. Gabriel J. Fleet, *What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235, 1242 (2008).

48. *See* Talley, *supra* note 45.

49. Newton v. Diamond, 204 F. Supp. 2d 1244, 1248–49 (C.D. Cal. 2002) ("Sound recordings and their underlying musical compositions are separate works with their own distinct copyrights.").

50. 17 U.S.C. § 106(2).

51. *Id.* § 101.

52. *Id.*

53. *Id.*

in the same style as an artist would be considered derivative works of the underlying musical composition.[54]

The definition of derivative works for sound recordings is more limited. Derivative rights for copyright holders of sound recordings extend only to those works in which the "actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality."[55] The Copyright Act expressly excludes sound recordings that "consist[] entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording" from the definition of derivative works.[56] Thus, under the Copyright Act, a third party may permissibly create a sound recording that is in the same musical style as a copyrighted sound recording through an entirely independent fixation of other sounds.[57] If an artist recorded a pre-existing song that created the same sounds, the new recording would not be a derivative work because it would be an "independent fixation."[58]

As technology has advanced, the ability to imitate sound recordings has become widely accessible. For instance, YouTube launched a tool allowing users to create songs with AI-generated voice clones of musicians who have partnered with the platform.[59] As this technology becomes widespread, IP rights are implicated because of the existing definition and interpretation of "derivative work."

D. Infringement of Musical Works and Sound Recordings

Understanding infringement is critical when analyzing whether AI-generated soundalikes violate copyright holders' rights. Copyright infringement occurs when someone interferes with a copyright holder's rights without permission. To prove an infringement claim, plaintiffs must

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54. *See* Palladium Music, Inc. v. EatSleepMusic, Inc., 398 F.3d 1193, 1200 (10th Cir. 2005) (holding that Palladium's copyrights in karaoke tracks were invalid because the sound recordings were impermissibly distributed derivative works of the underlying musical work).

55. 17 U.S.C. § 114(b).

56. *Id.*

57. Rachel Reed, *AI Created a Song Mimicking the Work of Drake and The Weeknd. What Does That Mean for Copyright Law?*, HARV. L. TODAY (May 2, 2023), https://hls.harvard.edu/today/ai-created-a-song-mimicking-the-work-of-drake-and-the-weeknd-what-does-that-mean-for-copyright-law/ [https://perma.cc/U2DS-9HT7].

58. 17 U.S.C. § 114(b). For example, Taylor Swift was unable to obtain master recording rights and instead opted to re-record her albums. Justin Tilghman, *Exposing the "Folklore" of Re-Recording Clauses (Taylor's Version)*, 29 J. INTELL. PROP. L. 402, 406 (2022).

59. Sarah Kuta, *YouTube's New A.I. Music Generation Tool Mimics the Voices of Popular Singers*, SMITHSONIAN MAG. (Nov. 20, 2023), https://www.smithsonianmag.com/smart-news/youtubes-new-ai-powered-music-generation-tool-mimics-the-voices-of-popular-artists-180983289/ [https://perma.cc/X2BC-GBKY].

prove: "(A) ownership of a valid copyright; and (B) unauthorized copying of the copyrighted work."[60] A court's infringement analysis examines whether the work was "actually copied" and whether the copied portion amounts to an "'improper or unlawful appropriation'" that results in a "'substantial similarity'" between the copyrighted work and the new work.[61]

Courts apply a variety of tests to determine whether infringement occurred. Copying can be proven by direct or indirect evidence.[62] When direct evidence is lacking, copying can be inferred if the defendant had access to the copyrighted work and substantial similarities between the works indicate non-independent creation.[63] Once access is established, whether through direct or circumstantial evidence, courts examine whether "improper or unlawful appropriation" occurred and determine whether substantial similarity exists.[64] This requires a two-part analysis: an objective extrinsic test and a subjective intrinsic test.[65] The objective extrinsic test examines elements of the song, broken down and compared, to determine whether protected elements of a work have been copied.[66] Commonplace elements of the work are not probative of copying. [67] The subjective intrinsic test requires that an ordinary, reasonable person would find substantial similarities in the concept and feel of the two works.[68] For sound recordings, the reproduction right is limited to works "that directly or indirectly recapture the actual sounds fixed in the recording."[69] Sound recordings are infringed by actual use of a copyrighted sound recording.[70]

There are conflicting standards for determining whether a sound recording has been infringed.[71] The Ninth Circuit, for example, applies the de minimis exception, which assesses whether "the average audience

60. New Old Music Grp., Inc. v. Gottwald, 122 F. Supp. 3d 78, 84 (S.D.N.Y. 2015).

61. *Id.* (quoting Jorgensen v. Epic/Sony Recs., 351 F.3d 46, 51 (2d Cir. 2003)); Hamil Am. Inc. v. GFI, 193 F.3d 92, 99 (2d Cir. 1999).

62. *Gottwald*, 122 F. Supp. 3d at 85.

63. *Id.* (quoting *Jorgensen*, 351 F.3d at 51).

64. *Id.* at 93 (quoting Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132 (2d Cir. 1998)).

65. Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004).

66. *Id.*

67. *Gottwald*, 122 F. Supp. 3d at 85.

68. *Swirsky*, 376 F.3d at 847.

69. 17 U.S.C. § 114(b).

70. *See* Elyssa E. Abuhoff, *Circuit Rift Sends Sound Waves: An Interpretation of the Copyright Act's Scope of Protection for Digital Sampling of Sound Recordings*, 83 BROOK. L. REV. 405, 411 (2017).

71. *Id.* at 414.

would not recognize the appropriation."[72] In contrast, the Sixth Circuit applies a bright-line rule that deems any copy of a sound recording, no matter how short, as taking something of value.[73] Instead of recognizing an exception, the Sixth Circuit warns individuals to "[g]et a license or do not sample."[74] This understanding of infringement is necessary for this Comment's subsequent discussion of copyright protections in light of AI-generated works.

II. ARTIFICIAL INTELLIGENCE-GENERATED SONGS CHALLENGE COPYRIGHT LAW

When AI uses copyrighted materials to mimic a singer's voice, copyright may be infringed either as an input—a copy of a protected work input in an AI program—or as an output—the resulting new work. In April 2023, a TikTok user posted "Heart on My Sleeve," which mimicked the voices of Drake and the Weeknd.[75] The success of the song triggered concerns from the music industry and called IP rights into question.[76] The song went viral on social media, garnering over nine million plays on TikTok, Spotify, and YouTube.[77] "Heart on My Sleeve" represents the emergence of AI-generated music to mimic voices and be perceived as authentic.

This section addresses the legal implications of this use by discussing the issues surrounding ownership of AI-generated works, infringement and removal of these works under the Digital Millennium Copyright Act (DMCA), rights available to copyright holders of the original works, and the viability of the fair use defense for AI-generated music.

A. Controversy Surrounding Ownership of AI-Generated Works

Copyright law provides rights holders the exclusive ability to reproduce, distribute, publish, and create derivative works.[78] Since AI systems began to generate works, legal scholars raised the question of whether those works, in part or in whole, could be copyrighted.[79] In March 2023, the United States Copyright Office provided regulatory guidance

72. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 878 (9th Cir. 2016) (quoting Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2003).

73. Bridgeport Music, Inc. v. Dimension Films, 401 F.3d 647, 658 (6th Cir. 2004).

74. *Id.* at 657.

75. Coscarelli, *supra* note 11.

76. *Id.*

77. *Id.*; Reed, *supra* note 57.

78. 75A N.Y. JUR. 2D LITERARY AND ARTISTIC PROPERTY § 2 (2023).

79. Reed, *supra* note 57.

regarding whether AI-generated works could be copyrighted, clarifying that works created with the assistance of AI may be copyrightable if the work involved sufficient human authorship.[80] Thus, a work can be copyrighted if a human selects or arranges AI-generated material in a "sufficiently creative way" that produces a work that constitutes an "original work of authorship."[81] Further, AI-generated works may be copyrighted if an artist modifies that material enough to meet the standard for copyright protection.[82] For example, the Copyright Office granted partial protection to the comic book, *Zarya of the Dawn*, that was partially AI-generated.[83] The Copyright Office found that the author used sufficient creativity because she wrote the textual elements and selected, coordinated, and arranged the visual elements.[84]

In September 2023, the Copyright Office applied this guidance to a copyright registration request for an AI-generated image that was later adjusted by a human artist.[85] In denying the registration request, the Copyright Review Board ("Board") noted that, although this work was edited by a human creator, it remained largely the same as the original generated by AI.[86] As such, the Board directed that the work be disclaimed and denied registration.[87] The Board did not address whether the creator's adjustments themselves would be copyrightable because it lacked sufficient information.[88] It remains unclear what protections exist for individuals whose already copyrighted works are modified by AI, particularly artists like Drake and the Weeknd, whose voices and musical styles have been manipulated and reproduced by AI.

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80. Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) (to be codified at 37 C.F.R. § 202) (quoting 17 U.S.C. § 101).

81. *Id.* (quoting 17 U.S.C. § 101).

82. *Id.* at 16192–93.

83. Letter from Robert J. Kasunic, Assoc. Reg. of Copyrights & Dir. of the Off. of Registration Pol'y & Prac., U.S. Copyright Off., on *Zarya of the Dawn* (Registration # VAu001480196) to Van Lindberg, Att'y to Kristina Kashtanova, (Feb. 21, 2023).

84. *Id.*

85. Letter from Suzanne V. Wilson, Gen. Couns. & Assoc. Reg. of Copyrights, U.S. Copyright Off., on Second Request for Reconsideration for Refusal to Register Théâtre D'opéra Spatial (SR # 1-11743923581; Correspondence ID: 1-5T5320R), to Tamara Pester, Att'y to Jason M. Allen. (Sept. 5, 2023).

86. *Id.*

87. *Id.*

88. *Id.*

B. Infringement and Removal Under the Digital Millennium Copyright Act

The DMCA provides copyright holders a vehicle to remove infringing content.[89] Drake's and the Weeknd's label, Universal Music Group, flagged IP concerns and successfully removed "Heart on My Sleeve" from streaming platforms.[90] Although Universal Music Group did not disclose how it removed the song from streaming platforms, legal scholars speculate that the label invoked the DMCA.[91]

Congress enacted the DMCA in 1998 to address the growing relationship between copyright and the internet.[92] Most pertinent here, the DMCA provides a takedown remedy—a process for rights holders to efficiently remove infringing material from the internet.[93] To obtain a DMCA takedown, a copyright holder must give notice to a third party that a work the third party is distributing is infringing the copyright.[94] Because a DMCA takedown is an effective and efficient process for rights holders to remove infringing content, scholars speculate that Universal Music Group claimed that some aspect of "Heart on My Sleeve" violated its rights.[95]

To establish infringement for a DMCA takedown, Universal Music Group may have argued that the new song included express copying or that the inputs were copied. When discussing possible arguments Universal Music Group may have cited in its report under the DMCA, legal scholar Louis Tompros noted that the "producer tag"[96] at the beginning of "Heart on My Sleeve" was an express copying of a short segment of producer Metro Boomin's work.[97] Tompros also identified possible arguments that copying the artists' songs into the system may be considered infringement and that the output itself is a derivative work.[98]

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89. Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998); *The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/dmca/ [https://perma.cc/9ACV-FFS4] (last visited Nov. 25, 2023).

90. Coscarelli, *supra* note 11.

91. Reed, *supra* note 57.

92. Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998); *The Digital Millennium Copyright Act*, supra note 89.

93. *The Digital Millennium Copyright Act*, supra note 89.

94. 17 U.S.C. § 512(c)(3).

95. Reed, *supra* note 57.

96. *Suno* Complaint *supra* note 14, at 24 ("A producer tag is a short, distinctive sound that certain artists or producers include in their sound recordings to identify their affiliation with a particular recording.").

97. Reed, *supra* note 57.

98. *Id.*

These types of arguments, however, have not yet been addressed by courts.

C. Rights Available to Human Copyright Holders in the Landscape of AI-Generated Works

When examining protections for human copyright holders, an open question remains as to when copyright law is implicated by AI-generated music.[99] Copyright holders filed complaints for infringement based on AI systems trained with copyrighted photographs and written works.[100] In October 2023, the music industry followed suit when Concord Music Group, Universal Music Group, and other record companies filed a complaint alleging that Anthropic, a multi-billion dollar AI business, infringed upon their copyrighted song lyrics.[101]

In June 2024, Universal Music Group, Sony Music, and Warner Music Group filed complaints against two online AI music generators, Sudo and Udio, alleging infringement of the record companies' sound recordings.[102] The complaints focus on the infringing nature of the inputs, alleging that Suno and Udio trained their AI models on copyrighted sound recordings.[103]

As these cases progress, courts will determine whether the inputs used to train, or the outputs generated by AI, amount to infringement. The answer to the outputs question may be more obvious in cases centered on written works or lyrics, such as the Concord Music Group case, in which Anthropic's program occasionally produced identical lyrics to

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99. *Id.*

100. Getty Images filed suit in February 2023 against AI-image generator, Stability AI, for infringing over 12 million photographs. *See* Matt O'Brien, *Photo Giant Getty Took a Leading AI Image-Maker to Court. Now It's Also Embracing the Technology*, ASSOCIATED PRESS (Sept. 25, 2023), https://apnews.com/article/getty-images-artificial-intelligence-ai-image-generator-stable-diffusion-a98eeaaeb2bf13c5e8874ceb6a8ce196 [https://perma.cc/3QUB-VFBC]. Seventeen authors also filed suit against OpenAI, creator of ChatGPT, in September 2023 for infringing on copyrighted works. Hillel Italie, *'Game of Thrones' Creator and Other Authors Sue ChatGPT-Maker OpenAI for Copyright Infringement*, ASSOCIATED PRESS (September 21, 2023), https://apnews.com/article/openai-lawsuit-authors-grisham-george-rr-martin-37f9073ab67ab25b7e6b2975b2a63bfe [https://perma.cc/969W-G6VR].

101. *See* Concord Music Grp., Inc., v. Anthropic PBC, No. 3:23-cv-01092, 2024 WL 3101098 (M.D. Tenn. 2024); Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, *Concord Music Group, Inc.*, No. 3:23-cv-01092, 2023 WL 8698446 [hereinafter *Concord* Memorandum].

102. *Suno* Complaint *supra* note 14; UMG Recordings, Inc. v. Uncharted Labs Inc., No. 1:24-cv-04777 (S.D.N.Y. June 24, 2024) [hereinafter *Uncharted Labs* Complaint].

103. *Suno* Complaint, *supra* note 14, at 42; *Uncharted Labs* Complaint, *supra* note 102, at 42.

copyrighted songs.[104] The concern surrounding inputs will be directly addressed by the June 2024 lawsuits against Suno and Udio.[105]

D. The Fair Use Defense for AI-Generated Works

Although "Heart on My Sleeve" likely trained on music from Drake and the Weeknd as inputs to generate the song, the song's creator may assert a fair use defense against infringement. In 1976, Congress codified the fair use defense to defeat liability for utilitarian uses of another's work.[106] Section 107 of the Copyright Act indicates that reproduction for the purposes of criticism, comment, news reporting, teaching, scholarship, or research is not infringement.[107] To determine whether fair use is a viable defense, Section 107 instructs that the following factors be considered:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.[108]

These factors are non-exhaustive, and fair use is determined on a case-by-case basis.[109] The first factor, which examines the purpose and character of the use, examines whether the new use is intended to supersede the original or whether it is "transformative" and alters the original with a "new expression, meaning, or message."[110] In 2023, the Supreme Court provided further guidance on this first factor in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*.[111] The Court clarified that this factor considers whether there is a "further purpose or different character" that should be "balanced against the commercial nature of the use."[112]

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104. *Concord* Memorandum, *supra* note 101, at 4.

105. *Suno* Complaint, *supra* note 14; *Uncharted Labs* Complaint, *supra* note 102.

106. Mike Schuster, David Mitchell & Kenneth Brown, *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177, 188 (2019).

107. 17 U.S.C. § 107.

108. *Id.*

109. Schuster et al., *supra* note 106.

110. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

111. 598 U.S. __, 143 S. Ct. 1258 (2023).

112. *Id.* at 1277. Interestingly, in dicta, the Court hints at this factor's application to the music industry stating that this factor "would not weigh in favor of a commercial remix of Prince's [song]

When examining the nature of a copyrighted work, courts look to (1) whether the original work is more fact-based or fictitious, "and (2) whether the work is published or unpublished."[113] Creative works are more likely to be protected compared to fact-based works, and fair use for unpublished works is likely to be narrower in scope.[114]

The third factor, which considers the amount and substantiality of the portion used, involves a qualitative and quantitative analysis.[115] The quantitative assessment looks to the amount of the original work used, with larger portions or use of "more of the copyrighted work than necessary" weighing against a fair use defense.[116] Courts' qualitative assessment examines whether the portion used is excessive in relation to the purpose of the new work under the first factor.[117] The qualitative assessment also examines whether the heart of a work is used; if so, albeit minimally, it may be considered substantial.[118] Ancillary works are more likely to weigh in favor of a fair use defense, whereas use of an important aspect of a work is likely to weigh against fair use.[119] For example, in *SOFA Entertainment v. Dodger Productions*,[120] the Ninth Circuit held that a seven-second clip from a television show in a musical was quantitatively insignificant.[121] Further, the *SOFA* court found that the use was qualitatively insignificant because the only distinctive aspects sought to be protected were movement, intonation, and charisma—uncopyrightable elements.[122] The qualitative and quantitative analyses are used in conjunction, and the outcome varies depending on whether large portions of unimportant segments are used or whether smaller portions of the heart of a piece are used.[123]

The fourth factor examines whether the new work is a market substitute for the original.[124] Courts examine if the new work "'usurps the market of

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'Purple Rain' just because the remix added new expression or had a different aesthetic." *Id.* at 1282. The Court seems to signal that this fair use factor would not weigh in favor of music created with another's previous work solely because the expression differs.

113. Blanch v. Koons, 467 F.3d 244, 256 (2d Cir. 2006).

114. *Id.*

115. Brown v. Netflix, Inc., 462 F. Supp. 3d 453, 462 (S.D.N.Y. 2020).

116. HathiTrustGuild, Inc. v. HathiTrust, 755 F.3d 87, 98; *Campbell*, 510 U.S. at 588.

117. *Brown*, 462 F. Supp. 3d at 462.

118. *Id.*

119. Schuster et al., *supra* note 106, at 193.

120. 709 F.3d 1273 (9th Cir. 2013).

121. *Id*. at 1279.

122. *Id.*

123. Schuster et al, *supra* note 106, at 193.

124. May v. Sony Music Ent., 399 F. Supp. 3d 169, 191 (S.D.N.Y. 2019).

the original work.'"[125] Where the target market of the new work is "sharply different" than the original, the potential market effects are limited.[126] For example, courts have held that parodies are not market substitutes for the original when they do not affect the value of the original work and they do not meet the demand for the original.[127]

"Heart on My Sleeve" likely copied sound recordings from Drake and the Weeknd as inputs to generate the song.[128] However, the creator could assert a fair use defense to insulate the song from a copyright infringement claim.[129] In arguing the first factor, the creator of "Heart on My Sleeve" could contend that the song is a "transformative" use of the original work.[130] However, courts may not be inclined to find an AI-generated work, which may be akin to the "commercial remix of . . . 'Purple Rain'" as referenced in *Goldsmith*, to be transformative merely because it is a new expression of the original work.[131] Rather, courts will likely find that the song serves a similar purpose to Drake's and the Weeknd's original songs. Further, the song's creator could argue that the input itself had no direct effect on the market because the copy was not made for commercial purposes, but rather it was used to train the AI.[132] The second factor, which examines the nature of the work, is unlikely to weigh in favor of a fair use defense because the original inputs are creative works rather than factual works.[133] The third factor, the amount and substantiality of the original work used, will be the most complicated to determine because the large data sets used to train AI make it difficult to reverse-engineer how

125. Est. of Smith v. Cash Money Recs., Inc., 253 F. Supp. 3d 737, 752 (S.D.N.Y. 2017) (quoting Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013)).

126. *See id.* at 752 (finding no evidence that the market would be usurped because a spoken-word, non-jazz recording contained in a jazz improvisational album targets a different audience than a hip-hop track).

127. *See* Elsmere Music, Inc., v. Nat'l Broad. Co., 482 F. Supp. 741, 747 (S.D.N.Y. 1980); Berlin v. E. C. Publ'ns, Inc., 329 F.2d 541, 543 (2d Cir. 1964).

128. *See* Complaint at 2, New York Times Co., v. Microsoft Corp., No. 1:23-cv-11195 (S.D.N.Y. Dec. 27, 2023) [hereinafter *New York Times* Complaint] (alleging that Microsoft and OpenAI created and reproduced The New York Times's content when training their AI products).

129. *See id*. at 8 (alleging that Microsoft and OpenAI publicly insist that the use of copyrighted inputs to train their programs constitutes fair use because their AI models serve "a new transformative purpose").

130. *Id.*

131. Andy Warhol Found. for the Visual Arts, Inc., v. Goldsmith, 598 U.S. __, 143 S. Ct. 1258, 1282 (2023).

132. *See New York Times* Complaint, *supra* note 128, at 50 (discussing how The New York Times requires third party permission before using its content for commercial purposes).

133. The fact that the original works are published works does weigh in favor of fair use.

AI songs are produced.[134] The fourth factor, which examines the effect on the potential market for or value of the copyrighted work, is likely to weigh against fair use. "Heart on My Sleeve" would likely be considered a market substitute for Drake's and the Weeknd's original works because listeners may choose to listen to these accurate vocal imitations rather than the artists themselves. Although courts have yet to decide whether the use of AI constitutes fair use, under current jurisprudence, it seems unlikely that fair use will be a viable defense for AI-generated soundalikes.

III. EXPANSION OF TRADITIONAL COPYRIGHT LAW PROVIDES INSUFFICIENT PROTECTION IN LIGHT OF AI MUSIC

Traditional means of ensuring protection for musicians may address an artist's interest in reproduction and obtaining profits. However, these methods fail to uphold copyright law's purpose of promoting "intellect or genius" and fail to address challenges to artists' integrity and reputation. This section discusses the shortcomings of Copyright Act reform, blanket licensing schemes, and reliance on the DMCA.

A. The Limits of Copyright Act Reform

Copyright Act reform is uncertain due to the slow reform process. Recall the AI-generated Bach invention that so effectively mimicked Bach's style that the audience believed it was an original composition.[135] This faux Bach invention was generated in 1997, yet even if Bach obtained a copyright under modern law, the Copyright Act still would not account for these technological developments that are over twenty-years old. As AI-generated musical works and sound recordings have become more common and advanced, some legal scholars have called for Copyright Act reform, particularly an expansion of the "derivative work" definition to include AI-generated works.[136]

Beyond the slow process of Copyright Act reform, even if efficient reform was feasible, expanding the derivative work definition would

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134. *See* Michael A. Griffith, *AI Lending and the ECOA: Avoiding Accidental Discrimination*, 27 N.C. BANKING INST. 349, 359 (2023) ("After an AI has been trained, the algorithm can become so complex that it is impossible to reverse-engineer how it works. This opacity in identifying exactly what happens between entering data into an AI algorithm and receiving data out has led to such programs being referred to as 'black boxes.'"); Martin Rohrmeier, *On Creativity, Music's AI Completeness, and Four Challenges for Artificial Musical Creativity*, 5 TRANSACTIONS INT'L SOC'Y MUSIC INFO. RETRIEVAL 50, 59 (2022).

135. Johnson, *supra* note 3

136. Sona Sulakian, *Protecting the Artist: Licensing in an AI-Generated Music Market*, 39 ENT. & SPORTS L. 137, 141 (2023).

inhibit innovation. Just as David Bowie found AI to be a resource for lyrical composition in 1995, musicians today view AI as a resource for music production and sharing.[137] AI provides musicians with an additional tool for exploring compositions beyond their habits.[138] Although expanding the definition of derivative works would provide protections for sound recordings used as inputs in derivative works, this reform would inhibit innovation broadly. Musicians who record with a label are not always owners of their sound recordings; rather, the label is more often the copyright owner.[139] While derivative work reform would prohibit musicians from using others' sound recordings to create AI-generated works, it is possible that this reform could create an additional barrier for musicians who seek to use their "own" recordings as inputs. Therefore, Copyright Act reform is an uncertain solution due to the slow reform process and potentially chilling effects.

Copyright Act reform also fails to address when AI-generated works are used to perpetuate stereotypes and misappropriate cultures. Capitol Records signed the digital avatar and virtual rapper FN Meka.[140] The virtual rapper was inspired by artists like Travis Scott, 6ix9ine and Lil Pump, but Capitol Records faced criticism for perpetuating stereotypes with FN Meka's "outlaw persona and suggestive lyrics."[141] Critics, including the nonprofit advocacy group Industry Blackout, took issue with the project "leech[ing] off the sounds, looks[,] and life experiences of real Black artists."[142] Others are concerned with the ability for individuals to profit off ethnic groups.[143] Thus, Copyright Act reform also fails to protect against stereotyping and misappropriation.

B. Blanket Licensing Schemes

Blanket licensing, which gives licensees the right to perform any work owned by a Performing Rights Organization (PRO), may address the needs of artists in the AI-generated music landscape.[144] Licensing allows copyright owners to streamline the process of permitting others to use

137. *See* Chow, *supra* note 1; Braga, *supra* note 2; Veltman, *supra* note 10.

138. *See* Chow, supra note 1; Braga, supra note 2.

139. Talley, *supra* note 45, at 84 n.89.

140. Tracy, *supra* note 5.

141. *Id.*

142. *Id.*

143. *Id.*

144. Brontë Lawson Turk, *"It's Been a Hard Day's Night" For Songwriters: Why the ASCAP and BMI Consent Decrees Must Undergo Reform*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 493, 503 (2016).

their works and receive compensation in return.[145] Copyright owners of musical works are granted the exclusive right to perform and to authorize others to perform their works publicly.[146] Copyright holders of sound recordings are provided a more limited public performance right by audio transmission under the Digital Performance Rights in Sound Recordings Act.[147] Copyright holders of musical works and sound recordings also have the right to reproduce and distribute their works.[148] Licensing schemes allow copyright holders to authorize others to publicly perform, reproduce, and distribute their works for compensation.[149]

Licenses for musical works undergo a streamlined process. Copyright owners join a PRO, which negotiates with those seeking to perform copyrighted works. [150] Today, three major PROs license nearly every musical composition in the United States: the American Society of Composers and Music Publishers, Broadcast Music, Inc., and SESAC, Inc.[151] These PROs collect fees from the public performances and distribute proceeds.[152] Technological advancements have changed licensing needs, which led to the birth of new types of licenses.[153] For example, master use licenses, which confer the right to synchronize sound recordings to audiovisual works, addressed a growing need for sound recording licenses.[154]

Some recommend the extension of blanket licensing schemes to the use of sound recordings in AI-generated works.[155] Blanket licensing allows licensees to use all works in a licensor's catalog—a model already offered by PROs.[156] Recognizing the unique legal challenges when dismantling and reverse-engineering AI-generated works, blanket licensing may provide an efficient and straight-forward path for artists to gain compensation for works used as inputs in AI-generated music.[157] The

145. See Nat'l Cable Television Ass'n, Inc., v. Broad. Music, Inc., 772 F. Supp. 614, 646 (D.D.C. 1991).

146. 17 U.S.C. § 106(4).

147. 17 U.S.C. § 106(6).

148. 17 U.S.C. § 106(1), (3).

149. Pomianowski, *supra* note 145, at 1535.

150. Turk, *supra* note 144, at 502.

151. *Id*. at 502–03.

152. *Id*. at 503.

153. *Id*.

154. *See* Michael P. Goodyear, *Synchronizing Copyright and Technology: A New Paradigm for Sync Rights*, 87 MO. L. REV. 95, 114 (2022)

155. Sulakian, *supra* note 136, at 140.

156. Eric Priest, *The Future of Music Copyright Collectives in the Digital Streaming Age*, 45 COLUM. J.L. & ARTS 1, 2 (2021).

157. Sulakian, *supra* note 136, at 140.

extension of blanket licenses for use in AI-generated works addresses the issue of exploitative infringement for large and small artists, and is a workaround for the inaccessibility of litigation for small artists whose works are used in AI music.

A blanket licensing proposal would promote the innovation necessary to accord with the Copyright Act's intent. It would provide an alternative that aligns with artists' desire for proper compensation. Moreover, innovation would not be inhibited if labels provided blanket licenses to their artists to use sound recordings in AI-generated works. In fact, popular musicians like John Legend, Sia, and Demi Lovato have already demonstrated their willingness to engage in the experimentation and innovation that AI affords by collaborating with YouTube's AI music generator.[158]

Blanket licensing schemes, however, create vulnerability for artists who elect to retain their works for their exclusive use. Copyright holders have the exclusive right to reproduce and distribute their works.[159] Once a recorded song has been distributed to the public, the underlying musical composition is subject to the compulsory mechanical license.[160] Thus, if AI generates a new work solely based on the musical composition, a copyright owner cannot prohibit its use.[161] This new work will likely be limited to a largely similar reproduction of the musical composition.[162] Songs that are not merely an AI reproduction of a pre-existing musical work, like "Heart on My Sleeve," would not fall under the compulsory mechanical license for two reasons: (1) the vocal imitations demonstrate the likelihood AI is largely trained on sound recordings,[163] and (2) even if the AI was trained on the musical composition itself, the new song does not reflect the "fundamental character" of the original work.[164] So, the copyright holder of the sound recording may elect to carve out the use of

158. Kuta, *supra* note 59.

159. 17 U.S.C. § 106(3).

160. 17 U.S.C. § 115.

161. *Id.*

162. *See* 17 U.S.C. § 115(a)(2) (providing that "a compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, *but the arrangement shall not change the basic melody or fundamental character of the work*, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner") (emphasis added).

163. In their complaint alleging infringement, Universal Music Group and other record labels allege that Suno "copied [their] copyrighted sound recordings *en masse* and ingested them into its AI model. Suno's product can only work the way it does by copying vast quantities of sound recordings from artists across every genre, style, and era." *Suno* Complaint, *supra* note 14, at 4.

164. *See* 17 U.S.C. § 115(a)(2). Compulsory licenses are not available for the duplication of sound recordings. 17 U.S.C. § 115(a)(1)(B).

their songs in AI-generated works. In doing so, the copyright owners may be more vulnerable to a fair use defense.[165] Thus, while blanket licensing promotes innovation and provides profits to artists whose works are licensed for use in AI music-generation programs, these benefits may come at a cost to artists who wish to retain full control over their works.

C. Unanswered Questions Surrounding the DMCA

The DMCA is an uncertain solution for artists whose works have been infringed because rights holders must establish why they believe their work has been infringed. A pressing question regarding the efficacy of the DMCA in the context of AI-generated works is how inputs and outputs are to be treated under U.S. copyright law. The DMCA takedown relies on an assertion by a copyright holder that someone is infringing their work.[166]

Relying on the argument that inputs infringe on a copyright holder's work is a vulnerable argument for both practical and legal reasons. First, it is difficult to reverse-engineer AI to determine which works trained the program to create a given AI-generated song.[167] Second, the input argument, which considers whether the use of copyrighted inputs is infringment, is vulnerable to the fair use defense because the output may still be considered "transformative."[168] Because the outputs of AI-generated works are often different from their inputs, the "purpose and character" of these works may differ from the original work such that they may be transformative for the purposes of the fair use defense.[169]

Output arguments that the new work is infringing suffer from the same weaknesses as input arguments. Fair use arguments are similarly strong because of the transformative nature of many AI-generated works. Even in instances where the song is not obviously transformative, but rather uses a small segment of a copyrighted work, if the output argument is made in a jurisdiction where the de minimis exception is recognized, it is unlikely that the substantial similarity requirements will be satisfied.[170]

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165. *See* Schuster et al, *supra* note 106, at 194–95 (discussing treatment of musical works not available for licensing and highlighting how courts tend to weigh this fact in favor of the fair use defense).

166. Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUT. & HIGH TECH. L.J. 621, 622 (2006).

167. Rohrmeier, *supra* note 134, at 59.

168. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569 (1994).

169. *See* 17 U.S.C. § 107(1); *Campbell*, 510 U.S. at 578-79.

170. *See supra* Section I.D.

"Heart on My Sleeve" may have effectively used the DMCA takedown remedy. "Heart on My Sleeve" features a detectable producer tag.[171] The producer tag is a clear sample from a copyrighted sound recording, so it is possible that the DMCA takedown hinged on the view of some jurisdictions that all unauthorized sampling is infringement.[172]

However, relying on the DMCA for protection is uncertain because of the lack of information surrounding the takedown and the arguments made to achieve it. Because the DMCA takedown remedy for AI-generated works is dependent on unanswered questions surrounding infringement by the courts, the DMCA is an unreliable remedy for infringement by AI-generated works.

IV. PROTECTIONS BEYOND COPYRIGHT LAW: THE RIGHT OF PUBLICITY

The U.S. Copyright Act leaves many unanswered questions regarding protections for musicians whose works are used in new sound recordings. Sources of protection differ depending on an artist's needs: whether an artist is seeking to preserve their image and reputation or whether an artist is seeking compensation for all uses of their work.[173] Copyright law addresses the property interest in one's works. However, an artist's ability to control works associated with them remains vulnerable. The right of publicity is a viable basis for artists to challenge the use of their voices in AI-generated works. However, this right provides incomplete protections due to the patchwork of state laws and its sole protection for recording artists as opposed to composers. This Part discusses the protection of musicians' voices under the right of publicity, briefly examines the patchwork of state laws, and proposes a federal right of publicity to ensure uniform protections.

171. A producer tag is a prerecorded vocal recording, often placed at the beginning of a song, that some producers use to "tag" their works with their name. Christopher Greene, *"Metro Boomin Want Some More" Intellectual Property Rights: Why Producer Tags Can & Should Be Protected by Trademark Law*, 53 CREIGHTON L. REV. 603, 604 (2020).

172. *See* Abuhoff, *supra* note 70, at 414.

173. *See* Reid M. Koski, Note, *Warhol, Drake, and Deepfakes: Monetizing the Right of Publicity in the Generative AI Era*, 40 GA. ST. U. L. REV. 981, 1008 (2024).

A. Applying the Right of Publicity to Voices

Well-known artists have succeeded in protecting their voices through the right of publicity.[174] In 1988, the Ninth Circuit addressed Bette Midler's concerns over her right to her voice.[175] Ford released a 1985 commercial as part of its "Yuppie Campaign,"[176] seeking to make emotional connections with Yuppies by bringing back college memories through song.[177] Ford's advertising agency was unable to contract with the original singers for ten of the songs used in the campaign, so the agency hired "soundalikes."[178] Midler's "Do You Want to Dance?" was performed by a soundalike for the Ford commercial with a license from the copyright holder to use the song.[179] Midler filed suit, claiming that her voice was misappropriated.[180] The district court did not find a legal principle that prevented the imitation of Midler's voice and granted summary judgment for the defendant.[181]

On appeal, the Ninth Circuit held that the use of Midler's voice, not her song, was at issue, so her claim was not preempted by federal copyright law.[182] The Ninth Circuit recognized that California Civil Code § 3344,[183] which protects aspects of an individual's personality when used for commercial purposes, was not applicable because the defendants did not use Midler's name, voice, signature, or photograph—they only used the soundalike.[184] Further, "likeness" refers to a visual image rather than a

174. Midler v. Ford Motor Co., 849 F.2d 460, 462–63 (9th Cir. 1988). Although voices themselves are not copyrightable because they are not "fixed in any tangible medium of expression," the right of publicity provides a means for protecting this identifiable feature. *Id.* (quoting 17 U.S.C. § 102(a)).

175. *Id*. at 460.

176. The term "yuppie" refers to young professionals who work and reside in urban areas. *See Yuppie*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/yuppie_n?tl=true [https://perma.cc/PMM8-NYW7].

177. *Midler*, 849 F.2d at 461.

178. *Id*.

179. *Id*. at 461–62.

180. *Id*. at 461.

181. *Id*. at 462.

182. *Id*.

183. Cal. Civ. Code § 3344(a), in part, provides that "any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof."

184. *Midler*, 849 F.2d at 463.

vocal imitation.[185] Thus, Midler could not recover under Section 3344.[186] However, the Ninth Circuit indicated that California law recognizes injury from "'an appropriation of the attributes of one's identity.'"[187] The court found that Ford used a Midler soundalike because the company valued an attribute of Midler's identity—the value being what Ford would have paid for Midler herself to have sung in the commercial.[188] The Ninth Circuit held that when a distinctive voice of a professional singer is widely known and is deliberately imitated to sell a product, the sellers "appropriated what is not theirs," thus committing a tort in California.[189]

Five years later, the Ninth Circuit faced another claim of voice infringement. In *Waits v. Frito-Lay, Inc.*,[190] singer Tom Waits sued Frito-Lay for voice appropriation and false endorsement after the company released a radio commercial that featured a voice imitation of Waits.[191] Waits is known for his "raspy, gravelly singing voice" and is regarded as a "prestige artist."[192] Waits appeared in several publications and performed on television programs but maintained a policy of refusing commercials.[193] Frito-Lay, in devising a marketing strategy for Doritos, was inspired by Waits's song "Step Right Up."[194] Frito-Lay ultimately released a radio commercial using an effective Waits voice imitator.[195] Upon hearing it, Waits realized that listeners would believe that he had agreed to do a commercial for Doritos.[196]

The *Waits* court recalled the holding in *Midler*, identifying the *Midler* tort[197] as "a species of violation of the 'right of publicity,' the right of a person whose identity has commercial value—most often a celebrity—to control the use of that identity."[198] This right of publicity "protects against

185. *Id*.

186. *Id*.

187. *Id*. (citing Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 (9th Cir. 1974)).

188. *Id*. at 463.

189. *Id*.

190. Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1093 (9th Cir. 1992), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

191. *Id*. at 1096.

192. *Id*. at 1097. The *Waits* court distinguished Waits's reputation as a "prestige artist" rather than "a musical superstar" because he "achieved both commercial and critical success." *Id*.

193. *Id*.

194. *Id*.

195. *Id*. at 1098.

196. *Id*.

197. *See* Midler v. Ford Motor Co., 849 F.2d 460, 463 ("[W]hen a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California").

198. *Waits*, 978 F.2d at 1098.

imitation for commercial purposes without the celebrity's consent."[199] The Ninth Circuit struck down Frito-Lay's copyright law preemption argument, recognizing the claim as misappropriation of a voice, which is not a copyright matter.[200] The *Waits* court upheld the viability of the *Midler* decision[201] and affirmed the jury's finding of misappropriation for Waits.[202]

In both cases, the Ninth Circuit makes clear that voices are not entitled copyright protection because they cannot be "fixed in a tangible medium;" however, the plaintiffs could prevail under the right of publicity claims.

B. States' Patchwork Right of Publicity Laws

Although the Supreme Court recognized a state law right of publicity in *Zacchini v. Scripps-Howard Broadcasting, Co.*,[203] the right of publicity is not federal law, and only thirty-five states recognize a right of publicity by statute or common law.[204] Publicity laws, as they currently stand, are highly fragmented across these thirty-five jurisdictions.[205] The right of publicity varies across states in the covered characteristics and uses, available remedies, and postmortem rights.[206] Indiana's right of publicity is the nation's most expansive, providing protections for personality, name, likeness, signature, voice, image, gestures, appearances, and mannerisms.[207] This statute also provides extensive remedies, including statutory and punitive damages, attorney's fees, and injunctive relief.[208] Indiana's injunctive relief includes confiscation and destruction of infringing goods.[209] New York, a state with many performers, recognizes a limited right of publicity that extends only to name, portrait, picture, and voice.[210]

Courts also apply differing tests to determine if an individual's right of publicity has been infringed. California's Supreme Court notably adopted

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199. *Id.*

200. *Id.* at 1099; *see also Midler*, 849 F.2d at 462 ("A voice is not copyrightable. The sounds are not 'fixed.'").

201. *Midler*, 849 F.2d at 463.

202. *Waits*, 978 F.2d at 1112.

203. 433 U.S. 562 (1977).

204. Rosler et al., *supra* note 26.

205. *See* Kevin L. Vick & Jean-Paul Jassy, *Why A Federal Right of Publicity Statute Is Necessary*, 28 COMMC'NS L. 14, 15–16 (2011).

206. *Id.*

207. IND. CODE § 32-36-1-7 (2023).

208. IND. CODE §§ 32-36-1-10–15 (2023).

209. *Id.*

210. N.Y. Civ. Rights L. § 51.

the transformative use test, which examines whether a defendant's use of a plaintiff's image is a protected "significant expression" or an unprotected "literal depiction or imitation."[211] Other jurisdictions like Missouri expressly reject California's approach, instead adopting the predominant use test, which gives rise to the right of publicity for the use of a person's name in a work if it was the author's "intention" to "attract attention" for commercial advantage.[212]

C. Enacting a Federal Right of Publicity to Address the Current Patchwork of Laws

The right of publicity, though fragmented throughout the United States, can provide relief for artists whose vocal imitations have been used by AI for commercial gain.[213] While some states seek to confer broad jurisdiction over defendants, this right is still severely limited by the patchwork legislation across states.[214] A federal right of publicity would provide uniform protections and relief for those whose publicity rights have been violated.

To protect singers whose voices are mimicked in AI-generated works, Congress should utilize its Commerce Clause power[215] to enact a federal right of publicity that preempts existing state right of publicity frameworks. A right of publicity framework that incorporates some of Indiana's broad protections and Missouri's predominant use test will protect singers whose voices are mimicked in AI-generated works.[216] To properly encompass the needs of singers in the landscape of AI-generated music, a federal right of publicity must be inclusive of voice as an extension of personality, and should also include name, signature, and picture at a minimum. However, a federal right of publicity must be

211. Winter v. DC Comics, 69 P.3d 473, 477 (Cal. 2003).

212. Doe v. TCI Cablevision, 110 S.W.3d 363, 373–74 (Mo. 2003) (en banc) (criticizing the "transformative use" test for failing to recognize the expressive and commercial aspects of a person's name and identity); Vick et al., *supra* note 205, at 14.

213. *See* Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988); Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1098 (9th Cir. 1992).

214. *See* Vick et al., *supra* note 205, at 15–16. (discussing how Indiana and Washington confer jurisdiction regardless of the domicile of the person whose right of publicity is at issue).

215. The Commerce Clause affords Congress the power to enact a right of publicity because infringing acts are frequently disseminated through the Internet, television, and radio—forms of media that are dispersed across states. *See* Gonzales v. Raich, 545 U.S. 1, 16–17 (2005) (discussing Congress's authority to regulate channels of interstate commerce, authority to regulate and protect instrumentalities of interstate commerce, and power to regulate activities that substantially affect interstate commerce).

216. *See* IND. CODE § 32-36-1-7; *see also Doe*, 110 S.W.3d at 374.

limited to preserve First Amendment rights.[217] Although some right of publicity statutes, such as Indiana's, enumerate many protectable attributes, these must be limited to guard against First Amendment violations.[218] The right must be universally available to encapsulate artists that may not be as recognized as Bette Midler or Tom Waits.[219] Remedies, in addition to any statutory damages, should allow for injunctive relief. For a federal right of publicity to properly protect artists whose voices are used, a takedown remedy, such as that provided by the DMCA,[220] should be expressly provided as a remedy.

To determine whether the right of publicity has been violated by AI vocal imitations, courts should model their analysis off of Missouri's predominant use test.[221] Applying this test in the context of AI soundalikes, courts will examine the use of a person's voice in a creative or expressive work.[222] If it was the author's intention to "attract attention" for commercial advantage, this use may give rise to the right of publicity.[223] In addition to providing protection when an artist's voice is used for purposes counter to their values or image, this test is favorable when addressing concerns over usurping an artist's market. By applying a standard that relies on an intention to "attract attention," the right of publicity would address artists' concerns of AI soundalikes usurping their market by garnering views solely because they use an artist's voice. A federal right of publicity is necessary to ensure that artists have a consistent basis for relief when an artist's sound recording is copied to produce vocal AI soundalikes—relief that is not dependent on the most appropriate state in which to file suit.

Although the right of publicity protects against infringing use of a musician's voice or likeness, gaps in protection still remain. The right of publicity can only extend to an artist's personality and extensions of their personality, like their voice. Because copyrighted music often involves a copyright in the underlying musical composition and a copyright in the sound recording, owners of the copyright for musical works or music publishers that own the sound recordings are not protected by the right of

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217. *See, e.g.*, White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1514 (9th Cir. 1993) (Kozinski, J., dissenting) (warning against the majority's overprotection of evoking the likeness of a celebrity, compared to the protection of a celebrity's "name, voice, signature, or likeness").

218. *See* IND. CODE § 32-36-1-7.

219. *See supra* section IV.B.

220. 17 U.S.C. § 512 (b)(2)(E).

221. *Doe*, 110 S.W.3d at 373; *Id.* at 374.

222. *Id.*

223. *Id.*

publicity.[224] Further, the right of publicity may fail to protect against harms faced by groups rather than individuals. The release of Capitol Records' virtual rapper FN Meka provides an example.[225] Although there are unlikely copyright concerns here because the virtual rapper was created by Capitol Records and was presumably trained using Capitol Records' own copyrighted material, critics argue that FN Meka amounted to "digital blackface."[226] This virtual rapper was seen as an insult to the Black community by appropriating mannerisms derived from Black artists and perpetuating "gross stereotypes."[227] If someone who did not hold these copyrights created a similarly controversial AI musician, or even if an AI user sought to profit off of ethnic and cultural styles, the right of publicity would fail to provide redress where no one artist could be identified as having their right of publicity violated. While this right of publicity is effective in protecting individuals, harms that might result from AI-generated music, and even avatars like FN Meka, would fail to protect communities.

Despite its limits, the right of publicity must be recognized as a means for redress that protects the innovation that AI contributes to music. Many artists have indicated an interest in AI music generation for their own use, and YouTube's AI music generator, a project in collaboration with several well-known singers, signals a willingness by some artists to make their works more widely accessible for public use.[228] By turning to the right of publicity for redress, AI music generation platforms can remain available and continue to be a tool for musicians.

CONCLUSION

Protections for musicians and music publishers are uncertain under the U.S. Copyright Act because it is unclear whether the use of copyrighted inputs or outputs constitutes infringement. The Copyright Act's current treatment of musical works, sound recordings, and derivative works leave gaps in protection for the original rights holder. While courts consider the application of copyright law to AI-generated musical works, singers are not left without relief. Although DMCA takedowns are vulnerable to the courts' treatment of AI music, they may provide a means for rights holders to effectively remove content from platforms. Blanket licensing schemes may address musicians' compensation concerns, though it may come at a

224. *See supra* section III.A.

225. Tracy, *supra* note 5.

226. *Id*.

227. Coscarelli, *supra* note 5.

228. Kuta, *supra* note 59.

cost to artists who wish to retain full control over their works. Most importantly, singers whose voices are imitated by AI soundalikes may find relief under the right of publicity, which protects an individual's right to control their identity. This right, however, must be extended federally to address the current patchwork of state laws. Relying on this right ensures that singers remain protected from unfavorable uses of their voice while preserving the technological progress that AI music generation affords artists.