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Protecting the Artist: Licensing in an AI-Generated Music Market

I. INTRODUCTION

While music is created by standing on the shoulders of giants, that giant needs to be recognized and appropriately compensated for their work. Many legal experts debate the distinction between inspiration and imitation, and that line continues to blur as artificial intelligence (“AI”) undertakes a greater role in the music composition process.¹ Companies have already begun to generate music, even vocals, by training AI algorithms on a dataset of musical examples.

In fact, the past few decades have witnessed algorithms become an inescapable phenomenon in the music industry, from the rhythmic patterns of guitar pedals to autotune.² Even Snoop Dogg’s latest album title pays homage to the digital revolution.³ But this flashy, futurist exterior belies a brewing multitude of legal issues. For example, music streaming

¹ There’s no universal legal definition of AI, but many laws make noteworthy attempts. *See, e.g.* National Artificial Intelligence Initiative Act of 2020, H.R. 6216, 116th Cong. § 3(3); Growing Artificial Intelligence Through Research Act, H.R. 2202, 116th Cong. § 3(1) (2019). Perhaps the most robust definition, the National Defense Authorization Act defines “artificial intelligence” in part as, “Any artificial system that . . . can learn from experience . . . when exposed to data sets. . . , and alternatively as “[a] set of techniques, including machine learning[,] that is designed to approximate a cognitive task.” John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 238(g), 132 Stat. 1636 (2018).

² Autotune is a pitch correction tool that applies a Fast Fourier Transform (FFT) algorithm across a signal split by a phase vocoder algorithm. U.S. Patent No. 5,973,252 2-3 (filed Oct. 14, 1998) (issued Oct. 26, 1999). Once the frequency is updated to meet the desired value, an inverse algorithm reverses the changes. *Id.* Sampling synthesizers and harmony generators use similar algorithms to manipulate sound and pitch. *Id.*

³ Snoop Dogg recently recruited a variety of hip-hop artists to create a compilation album titled “Snoop Dogg Presents Algorithm.” Anika Reed, *Best Features on Snoop Dogg’s New ‘Algorithm’ Album, from Usher to Mary J. Blige*, USA TODAY (Nov. 29, 2021, 1:30 PM), <https://www.usatoday.com/story/entertainment/music/2021/11/20/snoop-dogg-album-algorithm-best-features/6238733001/> [<https://perma.cc/SWU7-P2GN>].

companies may begin to repurpose their data about consumer trends to create their own music, a royalty-free product to replace the traditional artist.⁴

Since AI studies and learns from pre-existing samples, AI-generated music (“AI music”) holds an equivocal spot along copyright law’s idea-expression spectrum.⁵ The *scène à faire* doctrine extends this idea-expression principle and bars copyright protection for necessary or customary elements of a work within a genre.⁶ For example, an artist may copyright a particular song in the blues style but not the blues style or genre itself; that boundary had more distinction prior to the extensive use of AI technology. Now, the proliferation of digital tools that help compose music,⁷ and even generate music,⁸ challenges the original notion of musical composition as a fundamentally artistic endeavor. These new technological tools expose and exploit musical patterns and styles with an eye toward commercial profit. As a result, songs may become statistical and rule-based results that laterally shift the art of musical composition toward the “idea” side of the idea-expression divide.

A variant of these new tools allows users to train AI algorithms on a dataset of songs to generate new music in a similar style.⁹ Other forms of AI-generated works include deepfakes,

⁴ Music streaming service AiMi Plus looks to create new music by combining artist samples with AI-generated electronica. Ty Pendlebury, *Music Streaming Service Uses AI To Make Up Music on the Spot*, CNET (Aug. 13, 2021, 8:51 AM), <https://www.cnet.com/tech/services-and-software/music-streaming-service-uses-ai-to-make-up-music-on-the-spot> [<https://perma.cc/3VZA-WNTU>].

⁵ The idea-expression dichotomy refers to the tenet of copyright law that mandates protection only for an artist’s particular expression of an idea, while the underlying facts and ideas are never protected. *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 547 (1985).

⁶ 4 Nimmer on Copyright § 13.03(B)(4) (2021).

⁷ The company Algoriffix allows users to upload musical snippets, which the AI can then use to help the artist finish composing a piece, such as by recommending a meter and harmony. ALGORIFFIX, <https://www.algoriffix.com>. The company even sports the tagline, “AI as your co-writer.” *Id.*

⁸ One such company experimenting with using AI to generate music is Jukebox, which describes itself as “a neural net that generates music, including rudimentary singing, as raw audio in a variety of genres and artist styles.” JUKEBOX, <https://openai.com/blog/jukebox>.

⁹ For example, Boomy’s AI allows users to instantly generate a song just by selecting a genre. *Welcome to the Instant Music Revolution*, BOOMY, <https://boomy.com/about>. The software even helps users distribute and earn royalties on their creations. *Id.* In some ways, Boomy is lowering the barriers to entry to the music industry, just as the shift to music streaming allowed more people to listen to music and smaller artists to distribute their music. *See, e.g.*, MICHAEL MASNICK & LEIGH BEADON, *THE SKY IS RISING: A DETAILED LOOK AT THE STATE OF THE ENTERTAINMENT INDUSTRY 5* (2019), <https://skyisrising.com>. But by doing so, Boomy’s business model raises a plethora of legal and business questions, including regarding copyright ownership,

which use sophisticated AI to create super-realistic videos or audio that can clone and manipulate a musician's voice.¹⁰ Yet both forms of AI-based algorithms are inherently derivative, as they need some sort of training dataset to underpin new creations; an increasingly algorithm-centric world thereby drives human creativity towards innovating new techniques and styles, in addition to a particular song or musical expression of that style. In fact, recent case law suggests courts' rising amenability to this concept given the recognition of new intellectual property rights that may be significant, even crucial, in an AI-dominated music landscape.

This paper argues that the law should recognize rights in a musical style and, by extension, in a particular voice to conserve creative incentives. Part II argues that copyrights holders deserve compensation from AI-generated music trained on their copyrighted works, especially since the fair use defense does not cover non-parodic derivatives created for commercial gain. Part III explores trends in case law towards recognizing rights in one's distinctive style and voice. Part IV explains the technical difficulty of reverse-engineering a neural network and the evidentiary challenges in proving that a copyrighted work was used at some intermediary step to create new AI music. These considerations require that the music industry generally share the right; a blanket license would allow AI and other technological tools to spur innovation in the musical industry while providing an income source to current and legacy musicians who serve as the backbone of the change. Finally, Part V recognizes AI's growing prevalence in the music industry and its eventual "composing" of hit songs, which together mean that licensing music for algorithmic use may become a recognized derivative right for songwriters and composers.

II. INSULATING AI MUSIC FROM THE FAIR USE DOCTRINE

Generally, even a small portion of work can constitute infringement, given copyright law's historical rejection of the de minimis defense.¹¹ But because music continually builds upon

the potential flooding of the music streaming market, and the resulting impact on traditional licensing revenues.

¹⁰ In 2020, audio clips emerged of JAY-Z appearing to rap Shakespeare and Billy Joel's "We Didn't Start the Fire." Mark Hogan, *What Does JAY-Z's Fight Over Audio Deepfakes Mean for the Future of AI Music?*, PITCHFORK (May 11, 2020), <https://pitchfork.com/thepitch/what-does-jay-zs-fight-over-audio-deepfakes-mean-for-the-future-of-ai-music/> [<https://perma.cc/NJN5-T4MT>]. A YouTube description noted these works were "entirely computer-generated using a text-to-speech model trained on the speech patterns of JAY-Z." *Id.* JAY-Z tried unsuccessfully to take down these videos, with lawyers and other professionals noting that "[y]ou can't copyright a vocal style." *Id.* But, why not?

¹¹ See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) (no de minimis defense when defendant didn't dispute that he digitally sampled a copyrighted sound recording); *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70 (2d Cir. 1997) (no de minimis defense for a short display of a quilt on television). *Cf.* *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003)

itself, copyright law incorporates certain limits like fair use defense.¹² The fair use doctrine limits the grant of exclusive rights,¹³ serving as a “safety valve” to otherwise innovation-averse monopolies.¹⁴

Ordinarily, commercial use does not disqualify from fair use,¹⁵ and a significant transformative use can offset the commercial purpose of a work to support fair use.¹⁶ An otherwise infringing work may steer towards fair use if the work serves some form of commentary or criticism, such as the parody in the landmark case *Campbell v. Acuff-Rose Music*.¹⁷ While parodies have a commercial purpose and provide a similar function as the original piece, their transformative nature and commentary qualify them as fair use. AI music also transforms the original work in some significant manner, but AI music does so without intent to comment or criticize, or make any reference, to the original work. Rather, AI music attempts to market off successful musical styles that previous authors have worked to commercialize and build public traction. AI music creators thereby free ride on the original

(recognized the de minimis defense based on an average listener test for cases with partial literal infringement for music compositions, sound recordings, and perhaps other media).

¹² Copyright law exempts certain uses of a copyrighted work from liability as fair use. 17 U.S.C. § 107.

¹³ Courts review four factors to determine whether an otherwise infringing use qualifies as fair use: “(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.” 17 U.S.C. § 107. In analyzing the first factor, courts also look to see whether a potential infringer’s use transforms the original work in some significant manner. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹⁴ Justice Breyer best articulated the “safety valve” view of the fair use defense: “a context-based check that helps keep copyright monopolies in lawful bounds.” *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1187 (2021).

¹⁵ *Campbell*, 510 U.S. at 591.

¹⁶ *Id.* at 579. In *Campbell v. Acuff-Rose Music*, Justice Souter explained that a transformative use of an otherwise infringing work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* The Second Circuit clarified the definition of transformative use as a work that “serves a new and different function from the original work and is not a substitute for it.” *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014).

¹⁷ Back to the origins of fair use, the court in *Folsom v. Marsh* exempted a potential infringer from liability if copying was “for the purpose of fair and reasonable criticism” with the intention to criticize, not supersede, the original work. *Folsom v. Marsh*, 9 F. Cas. 342, 344-345 (C.C.D. Mass. 1841).

artist's efforts in a work that directly competes with the original work, which undoubtedly reduces the incentives that drive creative innovation.¹⁸

Furthermore, an AI musical piece would compete as a direct substitute for the original composition (after all, there's only one Billboard #1 spot).¹⁹ A new musical piece in a similar style may supersede and even divert profits from the original work. *Campbell* held that market harm excludes works that criticize or disparage the original, but this limited exclusion still leaves the market exposed for non-parodic derivatives of a work that should include licensing for AI training. While courts only consider *non-speculative* lost profits from lost sales and licensing revenues in derivative markets, AI-driven exemptions of fair use become more crucial with the proliferation of AI-generated music.

In some ways, AI music composition compares with previous cases involving technology that makes information more publicly accessible. In *Perfect 10 v. Amazon*, the court held that the “significantly transformative nature of Google’s [images] search engine, particularly in light of its public benefit, outweighs Google’s superseding and commercial uses of the thumbnail images”²⁰ The public benefit of AI music manifests in new forms of creativity, increased innovation, and decreased barriers to entry to the music industry, especially for individuals from a disadvantaged socioeconomic background. Revenue from algorithm-generated music would outweigh this benefit by redirecting those profits to individuals and companies who leverage the creative works of the original artists. A simplified licensing model can retain public benefits for AI-creators to continue developing music through algorithms while appropriately attributing and compensating the original artists.

Moreover, while a search engine provides a “new use” for the original copyrighted works,²¹ AI music uses copyrighted works to generate competing works that serve the same entertainment function. As another example, in *Authors Guild v. HathiTrust*, the fair use doctrine immunized the digitization of books into a full-text search database, which the court described as “a quintessentially transformative use” and further justified because “the copying was not

¹⁸ These factors were enough to convince a court to recognize an industry-specific tort of hot news appropriation. *Int'l News Serv. v. AP*, 248 U.S. 215, 229 (1918). This hot news tort was narrowed using certain factors: the information is gathered at a cost, the information is time sensitive, the defendant's use free rides on plaintiffs' efforts, the defendant directly competes with the plaintiff, and the ability to free ride would reduce plaintiff's incentives to gather and distribute information. *NBA v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997). Although this tort was further narrowed in future cases, the NBA factors show intellectual property law's function of limiting the ability to free ride and maintaining incentives for innovation. *See Barclays Capital Inc. v. TheFlyontheWall.com, Inc.*, 650 F.3d 876, 878 (2d Cir. 2011).

¹⁹ The court in *Harper & Row v. Nation* held that market injury, or the substitution effect, is the most important fair use factor. *Harper & Row v. Nation Enter.*, 471 U.S. 539, 566-67 (1985).

²⁰ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1166 (9th Cir. 2007).

²¹ *Id.* at 1165.

excessive[] and the full-text search function did not serve as a substitute”²² However, unlike the libraries’ use in *Authors Guild*, AI music does not deliver a different function from the original work and may actually substitute for the original work. AI music must, by design, also involve a significant amount copying, though not literal and spread across multiple works.

The harms of blocking AI-equipped songwriters from using artists’ creative works may outweigh those artists’ financial losses, but excluding AI music from fair use protection would force AI companies to negotiate with artists and establish a fair market value for their works. A blanket licensing regime may provide a good medium to accomplish this feat until the market develops a more robust approach.

III. THE RISE OF RIGHTS IN A DISTINCTIVE STYLE

A. THE RIGHT TO CLAIM OWNERSHIP OVER A MUSICAL STYLE

The utilitarian view of copyright law shies from overly broad protections that can stifle creativity. Yet, recent case law follows a different trend. Ariana Grande recently settled a case in which Josh Stone, who performs as DOT, claimed that Ariana’s hit song “7 Rings” copied the “beat, hook, lyrics, and rhythmic structure” of his song.²³ More notoriously, a Ninth Circuit decision extended copyright protection to a musical style.²⁴

The appeals court in *Williams v. Gaye* upheld the lower court ruling that Pharrell and Robin Thicke’s song “Blurred Lines” infringed on Marvin Gaye’s copyright in “Got To Give It Up” given the similarity in feel, although the two works were “not objectively similar” and “differ[ed] in melody, harmony, and rhythm.”²⁵ Despite the pitch similarity in the “signature phrases,” Judge Nguyen dissents, “Three consecutive pitches is just the sort of common theme that will recur in many compositions.”²⁶ Any music theory student can attest that Western music consists of a set number of recognized scales that harmonize in groups of three. The chord-based nature of Western music means a limited number of combinations will inevitably result in similar

²² *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 90 (2d Cir. 2014).

²³ Jonathan Stempel, *Ariana Grande Settles Lawsuit Claiming She Stole '7 Rings'*, REUTERS (Mar. 16, 2021, 12:36 PM), <https://www.reuters.com/article/us-music-ariana-grande-lawsuit/ariana-grande-settles-lawsuit-claiming-she-stole-7-rings-idUSKBN2B82SG> [<https://perma.cc/3HPS-PUJR>].

²⁴ In her dissent, Judge Nguyen summarizes the holding, “The majority allows the Gayes to accomplish what no one has before: copyright a musical style.” *Williams v. Gaye*, 885 F.3d 1150, 1183 (9th Cir. 2018).

²⁵ *Id.*

²⁶ *Id.* at 1188-89.

sounding songs. Accordingly, similar combinations of chords and scales form a genre, and to compose within that style, a blues songwriter must study other blues musicians, as an example.²⁷

The blurred line between inspiration and imitation further complicates with the addition of machine learning, which learns by example. While copyright law recognizes the independent creation defense to copyright infringement, music is not developed in a vacuum; musicians draw inspiration from a young age and often develop their musical styles at youth. Arguably, training an AI algorithm on a set of songs does not much differ from an impressionable teenager.

So what structural components of a musical piece should the law protect? To alleviate the ambiguity in determining the level of abstraction that courts should use to analyze a AI music, copyright infringement analysis should include some version of the abstraction-filtration-comparison test for non-literal copying that is tailored to music.²⁸ This stipulation would help protect the unique structural aspects of a composition, while preserving for creative use the musical structures inherent to a genre. In *Computer Associates Int'l v. Atlai*, the Second Circuit held that copyright protection may extend to the non-literal elements of a software program without violating the idea-expression principle.²⁹ An important distinction exists between writing in a musical style and copying distinct, creative elements of a copyrighted piece, which may include the choice of instruments, rhythmic structure, and other musical patterns mentioned by the Gaye heirs.³⁰ The law should afford these musical “paraphrases” of creative ideas the same protection as would a paraphrase of an author’s ideas from a book. With consideration to this protection, a forensic musicologist may determine the required level of abstraction to analyze a creative musical element and, from there, winnow down a piece into the “golden nuggets” of copyright-protectable expression.³¹

²⁷ Blues music famously follows a rigid set of rules, including its own scale and rhythmic pattern of repetition and contrast. Megan Lavengood, *Blues Melodies and the Blues Scale*, in OPEN MUSIC THEORY: VERSION 2 (2020), <https://viva.pressbooks.pub/openmusictheory/chapter/blues-melodies-and-the-blues-scale/> [<https://perma.cc/RY8Q-Y8SQ>].

²⁸ Beginning with *Comput. Assocs. Int'l Inc. v. Altai, Inc.*, courts use the Abstraction-Filtration-Comparison test (AFC) to determine whether the non-literal elements of a computer program, which are located within the protectable portions of code, satisfy the substantial similarity prong of copyright infringement analysis. *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706-11 (2d Cir. 1992).

²⁹ *Id.* at 701.

³⁰ *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGR_x), 2014 U.S. Dist. LEXIS 182240, at *34-47 (C.D. Cal. Oct. 30, 2014).

³¹ For cases of non-literal copying, Judge Learned Hand developed his famous levels of abstraction test that would allow courts to separate a work's protectable expressions from its unprotectable ideas. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

Some experts caution that recognition of an IP right in a musical style may lead to a proliferation of lawsuits and the resultant chilling effect on innovation;³² still, the growing ease of imitation accentuates the need for stronger creative rights that provide artists with ownership over their distinctive style, often inseparable from their identity. These legal reinforcements will thereby promote continued innovation.

B. THE RIGHT TO OWN ONE'S VOICE OR VOCAL STYLE

Just as consumers can often identify artists by their musical style, a person's voice can constitute a very personal aspect of one's identity. A moral argument may even advocate for a privacy right to autonomy over one's voice as an extension of their body. Imitation of a vocal style may therefore appropriate one's identity. Indeed, AI text-to-speech algorithms can analyze and replicate a person's pattern of speech, including their intonation, accent, tone, and emphasis.³³ While neither copyright, trademark, nor patent law generally protect voice, courts have recognized rights in a person's voice when used for commercial gain, at least with respect to a distinctive, well-known voice.

A voice generally does not qualify as copyrightable subject matter because "[t]he sounds are not 'fixed'."³⁴ In *Midler v. Ford Motor Co.*, Bette Midler claimed rights in her own voice that Ford imitated in an advertisement. The court recognized her vocal rights under a right of publicity variation and noted that "[a] voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested."³⁵ The Ninth Circuit's holding

³² Krysta L. Cox, *Blurred Lines: Can You Copy a Music Genre?*, ABOVE THE LAW (Mar. 23, 2018, 10:43 AM), <https://abovethelaw.com/2018/03/blurred-lines-can-you-copy-a-music-genre/> [<https://perma.cc/8RQE-28WU>].

³³ For example, Respeecher allows individuals to clone voices for use in films, video games, and other content. RESPEECHER, <https://www.respeecher.com>.

³⁴ *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988); *see also* 17 U.S.C. § 102; *Butler v. Target Corp.*, 323 F. Supp. 2d 1052, 1055 (C.D. Cal. 2004). A work must be fixed in a tangible medium to qualify for copyright protection. 17 U.S.C. § 101. Though a stretch and contrary to the Ninth Circuit's opinion in *Midler*, a voice embodied in a human being may satisfy the fixation requirement since the 1976 Act clarified that the medium of fixation is immaterial. Why not fixation within a human being? Isn't the way we express ourselves every day, our personal brand, a worthy form of creativity?

³⁵ *Midler*, 849 F.2d at 463. The court in *Waits v. Frito-Lay, Inc.* defines the right of publicity as "the right of a person whose identity has commercial value - most often a celebrity - to control the commercial use of that identity." *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1992).

emphasized the distinctive nature of Midler’s voice, a sufficient indicator of her identity, and the imitation’s commercial nature.³⁶ Similarly, in *Waits v Frito-Lay Inc.*, the Ninth Circuit held that a radio commercial imitating Tom Waits’s raspy voice violated his right of publicity under California law and constituted false endorsement under federal law.³⁷

These cases illustrate how the law may protect artists from nonconsensual imitations of one’s voice for commercial purposes. But copyright law has its limitations, such as when AI artists transform a voice enough for fair use consideration, akin to a voice impersonator. The user’s intent for a voice, natural or digital, should govern the legal consequence, e.g. whether the impersonation serves as commentary or appropriates a vocal style for commercial profit.

IV. A PRACTICAL PROPOSAL: DEVELOPING A BLANKET LICENSING SCHEME

In the music industry, performance rights organizations (PROs) frequently issue blanket licenses for music that they represent to radio stations and public performance venues in exchange for a fee.³⁸ This blanket license format presents a significant licensing opportunity for songwriters and composers in the AI music generation market. Many artists lack the financial means or technical expertise to bring lawsuits against new technologies that profit from their works. Given the legal challenges in proving that AI created music from copyrighted works and the technical difficulty of reverse-engineering a neural network, a blanket license would more simply allow artists to claim a portion of the benefits. Artists could register their music with a collective rights organization like Broadcast Music, Inc. The entity could then license their entire music catalog to AI companies for any variety of technological and innovative purposes.³⁹

³⁶ In *Midler*, the Ninth Circuit held that “when 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.” *Id.*

³⁷ *Waits*, 978 F.2d at 1098, 1100.

³⁸ Heather McDonald, *How a Blanket License Is Used in the Music Industry*, THE BALANCE CAREERS (Jan. 20, 2019), <https://www.thebalancecareers.com/blanket-license-in-the-music-industry-2460916> [<https://perma.cc/PM9U-Y9SF>]. In the United States, these organizations include Broadcast Music, Inc. (BMI), the American Society of Composers, Authors and Publishers (ASCAP), and Society of European Stage Authors and Composers (SESAC). *Id.* Songwriters may only join one PRO, but publishers must join each PRO that their songwriters belong to so that they may claim 50% of the credits. *Id.* A radio station, for example, will then apply to a PRO for a blanket license to use that group’s catalog of music in exchange for a fee. *Id.* To help the PRO accurately distribute royalties, the license purchaser must share their playlists or setlists for a certain time period. *Id.* Blanket licenses are particularly useful in cases where issuing licenses per work or per use would be unduly burdensome. *Id.*

³⁹ Rights to a particular voice should likely be excluded from this blanket license. Given the intensely personal nature of a voice and the ease of identifying the source of a unique voice, AI

A blanket license would also provide a public benefit through increased visibility into the evolution of music and improved access to copyrighted works for experimentation by young musicians. Just as artists are cautioned by their attorneys not to mention their “influences,” the current legal landscape incentivizes secrecy of the training dataset for any AI-generated song. A blanket licensing approach would allow and even encourage AI composers, or better called developers, to celebrate their influences and pay appropriate tribute. Furthermore, a blanket license would facilitate young musicians experimenting with new technologies by enabling them to pay a subscription fee and use copyrighted music for their new creations. Mimicking how Spotify and similar streaming platforms effectively suppressed the music pirating industry through their ease of use and a relatively small monthly fee,⁴⁰ a PRO could make music more readily available to the public in a recognized, legal manner.

Some legal experts may consider a blanket license a form of compulsory license, given the alternative burden of negotiating individual music licenses for each piece or use. But a blanket licensing approach could create a pool of money to fund artists from diverse or underprivileged socioeconomic backgrounds. By collecting royalties on unregistered but copyrighted music, these collective rights organizations can use this funding to support public initiatives in a similar fashion to how the legal industry repurposes unclaimed interest on IOLTA accounts for charitable purposes.

V. A LEGISLATIVE PROPOSAL: EXTENDING DERIVATIVE RIGHTS TO AI-GENERATED WORKS

What if an artist would like to claim derivative rights in their own work? To unambiguously provide this right to artists, the law would need to expand the understanding of “sound recording” in the statutory derivative right.⁴¹ A songwriter should have the derivative right to create AI music based on their own music. As AI tools become more pervasive in the music industry, this right may become more fundamental, especially if these derivatives generate

companies and others seeking to use a distinctive voice should be forced to negotiate with that individual and establish a fair market price for the use of that voice.

⁴⁰ While 2021 statistics from IFPI note that 30% of users still engage with music through copyright infringement, the same data also shows that 78% of people listen through a licensed audio streaming service, a trend that is accompanied by a 51% rise in time spent listening to music through subscription streaming services. INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (IFPI), ENGAGING WITH MUSIC 2021 9, 21, <https://www.ifpi.org/ifpi-releases-engaging-with-music-2021/> [<https://perma.cc/Z7R4-DB9M>].

⁴¹ Copyright protection extends to derivative works and compilations. Under 17 U.S.C. § 106(2), a copyright holder has the exclusive right to create derivative works, which includes a “sound recording . . . or other form in which a work may be recast.” 17 U.S.C. §101 (definition of a “derivative work”).

a substantial amount of a hit song’s total lifetime earnings and if these collateral earnings incentivize creative production.

If the law includes AI use as a derivative right, unlicensed AI music may constitute an unauthorized derivative work. So AI composers must negotiate licenses to use a work. Under the court’s narrow reading of 17 U.S.C. § 103(a) in *Anderson v. Stallone*, the non-infringing portions of a work do not qualify for copyright protection.⁴² The court points to case law and the Nimmer treatise, both of which hold that an artist cannot independently copyright any part of an unlawful derivative work because the preexisting material “pervade[s] the entire derivative work,” barring claims over the non-infringing parts.⁴³ Similarly, copyrighted music pervades an AI-generated piece since the AI copies patterns and builds internal rules based on preexisting works to generate the new piece.

Some experts may question the difference between an AI algorithm and a human composer, given that humans, whether consciously or subconsciously, create heuristics and internal logic as to what “sounds good” based on music they hear. Similar songs from a single artist or in a single album are a product of that internal playbook. But even human composers are liable for copyright infringement under a theory of subconscious copying.⁴⁴ Whether AI or human, music composers should pay appropriate compensation to artists whose work they used.

Even if the law recognizes AI as a derivative right, transformative use in case law continues to expand in scope and may resultantly render moot the statutory derivative right.⁴⁵ Artists may then question what constitutes a transformative use versus a derivative use. This ambiguity underscores the need for clear legislation that grants songwriters and composers derivative rights in their music.

VI. CONCLUSION

Songwriters and artists should maintain the ability to claim rights in all facets of their musical genius, including the unique structural elements, vocal style, and other distinctive features of their compositions. The technical and legal hurdles involved in analyzing AI music require a simplified contracting approach, which a blanket licensing model may remediate.

⁴² *Anderson v. Stallone*, No. 87-0592, 1989 U.S. Dist. LEXIS 11109, at *27-28 (C.D. Cal. Apr. 25, 1989).

⁴³ *Id.* at *27-30 (quote is at *28).

⁴⁴ In *Three Boys Music Corp. v. Bolton*, the jury found that Bolton’s hit “Love Is a Wonderful Thing” infringed on the Isley Brothers’ song of the same name based on access and substantially similarity. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481, 486 (9th Cir. 2000). Sufficient circumstantial evidence of access existed given the widespread dissemination of the original song where Bolton grew up and a strong similarity to the original song, both of which pointed to subconscious copying. *Id.* at 482-84.

⁴⁵ *Kienitz v. Scornie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

Eventually, the law will need to adapt to the changing digital music landscape by expanding copyright protection to related, AI-generated forms of expression.