

# CAN AN AI AUTHOR MAKE BILLBOARD'S "HOT 100" LIST? THE FUTURE IN AI AND WHY THE MUSIC INDUSTRY SHOULD BE PAYING ATTENTION

---

Tara Kooklanfar\*

## I. INTRODUCTION

As an up-and-coming songwriter, you invested your time, money, and resources into creating your first breakout album using artificial intelligence ("AI") as a tool to assist in the creative process. However, just as you are about to release the album, you are hit with a lawsuit from a technological company alleging you have infringed on their copyright. In the complaint, the company alleges that the AI used to create the songs on the album is the author of the work and holds the copyright interest in the final product, as it was the one that fixed the songs in a tangible medium of expression.<sup>1</sup> This scenario raises important questions about the role of AI in the creative process and its potential for claiming copyright ownership over AI-generated work. Can AI qualify as an "author" under the U.S. Copyright Act and have statutory standing to bring a lawsuit? As AI becomes more prevalent in various industries, these questions are becoming increasingly relevant and must be addressed.<sup>2</sup> The outcome of this lawsuit could have significant

---

\* Tara Kooklanfar is a third-year law student at Southwestern Law School, class of 2024. She is ranked top 10% of her class and achieved recognition by Southwestern's Biederman Entertainment, Media and Sports Law institute as a "Biederman Scholar," showing excellent academic performance with a demonstrated interest in the field of entertainment law. Prior to law school, Tara has shown a long-standing commitment to developing a career within the field, holding over seven years of experience working closely with creatives in music, film, and television. Tara hopes to intertwine her interest with entertainment and artificial intelligence in the future.

1. 17 U.S.C. § 102(a).

2. Darrell M. West & John R. Allen, *How artificial intelligence is transforming the world*, BROOKINGS INST. (Apr. 24, 2018), <https://www.brookings.edu/research/how-artificial-intelligence-is-transforming-the-world/>.

implications for the use of AI in the creative arts and could shape the future of copyright law.

It is undeniable that younger generations have never known a world without search engines and digital media. Technology has advanced at an unprecedented rate and has the potential to significantly change the way we protect and enforce intellectual property (“IP”) rights. Yet, the impact of these advancements on IP policy has received relatively little attention. This lack of focus on the intersection of technology and IP could have serious consequences for creators, innovators, and consumers in the digital age. Adopting new technology can lead to shifts in the way that IP is created, shared, and commercialized, potentially affecting the distribution of wealth and the balance of power between different stakeholders in the IP ecosystem. It is crucial that we begin to address the broader implications of AI use with a sense of urgency and take proactive steps to ensure that our IP laws are equipped to handle the challenges presented in a way that serves the interests of all parties involved.

While AI-generated work makes its way into the creative process for many artists in the entertainment industry, valid concerns remain regarding the encroachment of copyright ownership. While the future of AI becomes more complex as artists continue to incorporate AI in their creative process, those fearful of AI’s rights due to the ambiguous scope of “authorship” fail to note that an AI-generated work remains consistent with the current framework of the Copyright Act.<sup>3</sup>

This note examines the impact of AI use within the music industry space and the concerns its usage may raise involving copyright protection. Part II provides a brief background into the elements required to obtain copyright protection under the U.S. Copyright Act and how AI is being used today. Part III argues how the principle of using AI as a creative tool already fits within existing copyright law and would remain protected. Part IV presents the dangers of legislation taking a broad approach in expanding the scope of “authorship” under copyright law to include AI, as well as the advantages in restricting its scope to ensure human expression and content authenticity are preserved. Finally, Part V concludes with the argument that AI should not qualify as an author for copyright purposes, such that songwriters who choose to utilize AI during their creative process should maintain sole copyright ownership of the final work, and AI’s role in the process is merely

---

3. An AI product’s “terms of use” contractually modify the scope of ownership and usage; however, this Note instead focuses on presumptive ownership in the absence of an agreement at the time of creation. *See, e.g.*, Audoir AI Music Apps Terms of Use, AUDOIR (May 8, 2023), <https://www.audoir.com/terms-of-use>.

as a tool that provides building blocks to aid users in executing their innovative vision.

## II. BACKGROUND

### A. *The Copyright Act*

Under the U.S. Constitution, Congress has the authority “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>4</sup> The Copyright Act of 1976 governs all legal issues under today’s copyright law.<sup>5</sup> The Copyright Act grants protection “in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>6</sup> Under common law, copyright protection for an unpublished work is established “from the moment of its creation.”<sup>7</sup> However, it is well-known that obtaining a formal copyright registration over a work is encouraged to effectively bring suit for infringement in federal court.<sup>8</sup> To be granted copyright registration, the U.S. Copyright Office is responsible for determining whether the given work meets the elements of copyright protection, in that the work was independently created, sufficiently original, and produced by a human author.<sup>9</sup> In the entertainment space, creative artists can protect the unauthorized use of their IP through legal registrations in copyrights, patents, trademarks, and trade secrets.<sup>10</sup> The role of IP within the entertainment space has been vital in preserving a company’s reputation and legacy. The most widely used form of IP has been copyright, which grants an individual of a given work exclusive rights to use their work while preventing others from doing so without their permission.<sup>11</sup> One who seeks copyright registration will receive numerous benefits such as a “bundle of rights,” giving the owner

---

4. U.S. CONST. art. I, § 8, cl. 8.

5. 17 U.S.C. § 102(a).

6. *Id.*; James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 83 (2012).

7. *Twin Books Corp. v. Walt Disney Co.*, 83 F.3d 1162, 1165 (9th Cir. 1996).

8. *See Frequently Asked Questions: Copyright in General*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq/faq-general.html#what> (last visited Nov. 13, 2023).

9. *See* U.S. COPYRIGHT OFF, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES ch. 300, § 302 (3d ed. 2021), <https://www.copyright.gov/comp3/docs/compendium.pdf>.

10. Jesse Weiner, *Understanding Intellectual Property Rights in Music*, YK L. (Sept. 2, 2020), <https://www.yklaw.us/blog/2020/09/is-music-intellectual-property/>.

11. Ilakkia Kamaraj, *Role of IP in the Media Industry*, ENHELION (Oct. 2, 2021), <https://enhelion.com/blogs/2021/10/02/role-of-ip-in-the-media-industry/>.

a right to reproduce, display, distribute, adapt, and perform the work.<sup>12</sup> Additionally, copyright registration gives the owner legal standing to bring an infringement claim against a party in federal court and seek monetary damages.<sup>13</sup>

For a creative work to be protected under the Copyright Act, the work must be independently created and show a “modicum” of creativity.<sup>14</sup> The Supreme Court held that “the requisite level of creativity is extremely low; even a slight amount will suffice.”<sup>15</sup> The work must also be “fixed in any tangible medium of expression . . . from which [it] can be perceived, reproduced, or otherwise communicated,” such as a sound recording or musical composition.<sup>16</sup> Copyright protection does not protect the ideas of the work themselves, but rather the tangible form of those ideas.<sup>17</sup> This principle is known as the “idea/expression distinction.”<sup>18</sup> Another concept similar to the idea/expression distinction is the merger doctrine, which emphasizes that when there are only so many ways to express a given idea, those tangible expressions merge into the idea itself, and are also not protected under copyright.<sup>19</sup>

#### B. “Human” Authorship Requirement Under the Copyright Act

Historically, our society generally interprets the element of “authorship” under copyright protection to mean “human authorship.”<sup>20</sup> For example, courts have held that the existence of facts showing a human’s originality, intellectual authorship, and production of a photograph satisfies the element of human authorship for copyright protection.<sup>21</sup> The Supreme Court in *Burrow-Giles* noted that a tangible expression of artwork would “embody the intellectual conception of its author . . . and therefore comes within the purpose of the constitution in securing its exclusive use or sale to its author.”<sup>22</sup> Bridy, a distinguished copyright scholar, notes that the Court defined authorship by referring to the Constitution’s reliance on English

---

12. See 17 U.S.C. §106; DeBriyn, *supra* note 6; Kamaraj, *supra* note 11.

13. See DeBriyn, *supra* note 6; Kamaraj, *supra* note 11.

14. *Copyright Basics*, UNIV. OF MICH. LIBR., <https://guides.lib.umich.edu/copyrightbasics> (Aug. 1, 2023, 7:24 AM).

15. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

16. 17 U.S.C. §102(a).

17. *Copyright Basics*, *supra* note 14.

18. *Id.*

19. *Id.*

20. See UNITED STATES COPYRIGHT OFFICE, *supra* note 9, § 306.

21. See *Burrow-Giles Lithographic Co. v. Saromy*, 111 U.S. 53, 59–61 (1884).

22. *Id.* at 58–59.

law:<sup>23</sup> Copyright is “the exclusive right of a man to the production of his own genius or intellect,” and an author is “he to whom anything owes its origin [sic]; originator; maker; one who completes a work of science or literature.”<sup>24</sup>

The U.S. Copyright Office “will register an original work of authorship, provided that the work was created by a human being. The copyright law only protects ‘the fruits of intellectual labor’ that ‘are founded in the creative powers of the mind.’”<sup>25</sup> As “copyright law is limited to ‘original intellectual conceptions of the author,’ the Office will refuse to register a claim if it determines that a human being did not create the work.”<sup>26</sup> In *Thaler v. Perlmutter*, the District Court upheld the U.S. Copyright Office’s decision, ruling in favor of the defendant, holding that under the Copyright Act, copyrighted works require human authorship, and AI-authored works fail to meet the definition of “human” for copyright purposes.<sup>27</sup> The suit was brought by Stephen Thaler, the inventor of the AI, against the U.S. Copyright Office following the denial of his registration application in listing his AI as the author of the work, attempting to secure AI intellectual property rights in the artwork.<sup>28</sup> The Copyright Office’s denial was “on the basis that the work created by [Thaler’s] AI lacks the human authorship necessary to support a copyright claim.”<sup>29</sup> The board found that a “vital element of copyright” is the relationship among “the human mind and creative expression.”<sup>30</sup> While the District Court considered the issue of human authorship in its ruling, it also considered the idea of the “work-for-hire doctrine in the context of generative AI.”<sup>31</sup> The court noted that since there was no underlying

---

23. See Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 5 STAN. TECH. L. REV. 1, 5 (2012).

24. See Copyright Basics, *supra* note 14, at 57–58 (quoting JOSEPH E. WORCESTER, *DICTIONARY OF THE ENGLISH LANGUAGE* 99 (1860)).

25. See UNITED STATES COPYRIGHT OFFICE, *supra* note 9, § 306 (quoting *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879)).

26. See *id.* (quoting *Burrow-Giles*, 100 U.S. at 58).

27. Jane Recker, *U.S. Copyright Office Rules A.I. Art Can’t Be Copyrighted: An Image Generated Through Artificial Intelligence Lacked the “Human Authorship” Necessary for Protection*, SMITHSONIAN MAG. (Mar. 24, 2022), <https://www.smithsonianmag.com/smart-news/us-copyright-office-rules-ai-art-cant-be-copyrighted-180979808/>; see also, Authors Alliance, *Copyright Protection in AI-Generated Works*, <https://www.authorsalliance.org/2023/08/24/copyright-protection-in-ai-generated-works-update-decision-in-thaler-v-perlmutter/>.

28. See Riddhi Setty, *Artificial Intelligence Can Be Copyright Author, Suit Says*, BLOOMBERG L. (June 3, 2022, 10:46 AM), <https://news.bloomberglaw.com/ip-law/artificial-intelligence-can-be-copyright-author-lawsuit-alleges>.

29. *Id.*

30. Adi Robertson, *The US Copyright Office Says an AI Can’t Copyright Its Art*, THE VERGE (Feb. 21, 2022, 8:54 AM), <https://www.theverge.com/2022/2/21/22944335/us-copyright-office-reject-ai-generated-art-recent-entrance-to-paradise>.

31. Authors Alliance, *supra* note 27.

copyright in the work due to its lack of human authorship, it would therefore fail to meet the work-for-hire theory, as it requires the hired creator to also be human.<sup>32</sup> In response to the ruling, Thaler's attorney has filed an appeal with the D.C. Appeals Court, the outcome is yet to be determined whether the appellate court will uphold the ruling.<sup>33</sup>

The "human" component in determining authorship is not a new concept but has been a key turning point in resolving the issue of whether non-humans can receive copyright interest in a given work.<sup>34</sup> For example, a 1997 copyright dispute hinged on the issue of "whether the work, because it is claimed to embody the words of celestial beings rather than human beings is copyrightable at all."<sup>35</sup> The court agreed that "some element of human creativity must have occurred" to grant copyright protection over the work in question.<sup>36</sup>

A more recent landmark case underscored this requirement for human authorship.<sup>37</sup> In *Naruto v. Slater*, the Ninth Circuit resolved the issue of whether a monkey has a legal right to own the copyright of the "selfie" it captured on a human's iPhone.<sup>38</sup> The Ninth Circuit found that while a living being, such as a monkey, could hold independent thoughts and judgments, non-humans lack "statutory standing" under the U.S. Copyright Act.<sup>39</sup> The court reaffirmed the lower court's holding in *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, reasoning that if Congress had the intent to grant non-humans legal standing to bring suit, the plain language regarding authorship would be unambiguous.<sup>40</sup>

Requiring a work to be authored by a human has been the prevailing argument for those engaged in the intellectual space.<sup>41</sup> For example,

---

32. *Id.*

33. *Id.*

34. See Susannah Cullinane, *Monkey Does Not Own Selfie Copyright, Appeals Court Rules*, CNN (Apr. 24, 2018, 9:27 AM), <https://www.cnn.com/2018/04/24/us/monkey-selfie-peta-appeal>.

35. *Urantia Found. v. Maaherra*, 114 F.3d 955, 958 (9th Cir. 1997).

36. *Id.*

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

38. Joshua Berlinger, *PETA, Photographer Reach Settlement in 'Monkey Selfie' Case*, CNN (Sept. 12, 2017, 6:19 AM), <https://www.cnn.com/2017/09/12/asia/monkey-selfie-settlement/>.

39. *Naruto*, 888 F.3d at 420.

40. *Id.* at 425–26.

41. See, e.g., Vito Petretti & Oliver Bell, *Australian Court Overturns AI Invention Ruling*, MORGAN LEWIS (May 12, 2022), <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2022/05/australian-court-overturns-ai-invention-ruling> ("In 2021, the Australian Federal Court ruled in a landmark case that a device characterized as an artificial intelligence (AI) machine could for the first time be listed as an inventor on a patent application for the purposes of the Australian Patents Act 1990 (the Act).") However, "[o]n appeal . . . a five-judge bench of the Australian Full Federal Court unanimously reversed that decision, finding that an inventor must be a natural person

Hannibal Travis’s research in understanding AI’s place in copyright law has uncovered an impactful commentary by Pamela Samuelson.<sup>42</sup> Travis found that in Samuelson’s article, she defended the view that “the *user* of the computer . . . would be the copyright owner of such a work.”<sup>43</sup> Moreover, Travis found that Samuelson’s article confronted potential challenges on the issue of “authorship” in cases where computer software companies seek to argue that the computer itself should qualify as an author under the Copyright Act.<sup>44</sup> It is the human itself who feeds the AI its unique, innovative idea, and the AI’s primary function is to execute that idea so that it can transcend the limitations that ordinary humans have.

### C. *Understanding AI-Generated Work and Its Impact on Copyright Ownership*

Artificial intelligence is a system or machine that is encoded to mimic human intelligence and exhibit traits associated with humans, such as self-improvement and absorbing knowledge.<sup>45</sup> The advancement of AI has impacted almost every industry we see today,<sup>46</sup> including the music industry.<sup>47</sup> Many producers and composers have welcomed the use of AI as a way to push their creative boundaries.<sup>48</sup> In 2019, Huawei, a Chinese

for the purposes of the Act.”); Hannibal Travis, *Intelligent Entertainment: Shaping Policies on the Algorithmic Generation and Regulation of Creative Works*, 14 FIU L. REV. 179, 184 (2020).

42. *See id.*

43. *Id.*

44. *Id.* at 184–85.

45. *See generally* Yongjun Xu et al., *Artificial Intelligence: A Powerful Paradigm for Scientific Research*, 2 THE INNOVATION 1,1 (Nov. 28, 2021), <https://www.sciencedirect.com/science/article/pii/S2666675821001041>.

46. *See generally* Reuters, *Trump Administration to Launch Artificial Intelligence Initiative*, NBC NEWS (Feb. 11, 2019, 5:46 AM), <https://www.nbcnews.com/tech/internet/trump-administration-launch-artificial-intelligence-initiative-n969981> (explaining that in 2019, former U.S. President Donald Trump signed the American AI Initiative Order directing federal agencies to devote more research into the advancement of AI by providing access to federal data and anticipate adapting to working alongside AI).

47. Arek Skuza, *The Increasingly Influential Role of AI in the Music Industry*, THE INNOVATION (Aug. 26, 2022), <https://arekskuza.com/the-innovation-blog/the-increasingly-influential-role-of-ai-in-the-music-industry/#:~:text=AI%20is%20playing%20an%20increasingly,the%20quality%20of%20streaming%20services;Top%2010%20Examples%20of%20Artificial%20Intelligence%20in%20Use%20Today>, DATA MITES (Apr. 11, 2019), <https://datamites.com/blog/top-10-examples-of-artificial-intelligence-in-use-today/>.

48. Maura Barrett & Jacob Ward, *AI Can Now Compose Pop Music and Even Symphonies. Here’s How Composers Are Joining in*, NBC NEWS: MACH (May 29, 2019, 10:07 AM), <https://www.nbcnews.com/mach/science/ai-can-now-compose-pop-music-even-symphonies-here-s-ncna1010931>; (Note- This “all-in-one” music AI app has been replaced by a suite of different apps by the company now called: “Lyrics To Music AI”, “AI Music Magic”, “All Lyrics Assistant”, “All Music Builder”, “Rhyme Lines AI”, and “Quick Lyrics AI.”).

technology company, and composer, Lucas Cantor, managed to complete “one of the most famous incomplete works in musical history,” Schubert’s Symphony No. 8, with the help of AI.<sup>49</sup> The engineers input data that resembled music into a smartphone, “so the AI had information about the timbre, pitch, and meter that Schubert liked to use in his melodies.”<sup>50</sup> With the growing technological advancement of AI in the music space, songwriters and music producers alike have now been able to utilize AI as a tool to expand their artistry while easily collaborating with this new, machine-learning device.<sup>51</sup>

An example of an AI program that musical artists use today is “AI Music Pro,” which generates lyrics and rhythms for the user.<sup>52</sup> Its company’s mission is to provide an innovative and engaging way for its users to create songs and achieves this “by training our AI with hit songs, and building lyrics and music tools that are easy to use.”<sup>53</sup> When looking at the program at a glance, it seems to be user-friendly, providing step-by-step tutorials on its page to ensure that users are satisfied with the final product.<sup>54</sup> The AI is programmed to provide the basic fabrics that respond to the human operator’s involvement and commands.<sup>55</sup> The AI program appears to be an easy process for anyone to use and utilize as a tool to generate music. Another AI software is “Jukebox,” which has been used to enhance consumer experience by analyzing its users’ behavior and recommending songs they might enjoy.<sup>56</sup>

### III. WILL COMPANIES FUNDING (AI) HAVE STANDING TO BRING SUIT UNDER COPYRIGHT OWNERSHIP OVER AN AI-GENERATED SONG?

Regarding the utility-based use of machine-learning devices to generate art, there have been questions concerning the method and potential “far-reaching commercial implications” of legislation addressing AI’s impact on copyright law.<sup>57</sup> As Bridy notes, “Narrow AIs that generate art, literature, music, and audiovisual works are now in wide enough circulation that the

---

49. Elizabeth Davis, *Schubert’s ‘Unfinished’ Symphony Completed by Artificial Intelligence*, CLASSIC FM (Feb. 6, 2019, 1:26 PM), <https://www.classicfm.com/composers/schubert/unfinished-symphony-completed-by-ai/>.

50. *Id.*

51. See Barrett & Ward, *supra* note 48.

52. Audoir AI Music Apps, AUDIOIR, <https://www.audoir.com/> (last visited Dec. 15, 2022).

53. *Id.*

54. See *id.*

55. See *id.*

56. See AREK SKUZA, *supra* note 47.

57. Andres Guadamuz, *A.I. and Copyright*, WIPO MAG. (Oct. 2017), [https://www.wipo.int/wipo\\_magazine/en/2017/05/article\\_0003.html](https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html).

time is upon us to consider their relationship to copyrights and the legal construction of authorship on which copyrights depend.”<sup>58</sup> Considering the use of AI in the music space, the question arises whether technology companies funding the AI have the right to sue artists for songwriting royalties.<sup>59</sup> For example, one might argue that when an artist uses AI assistance to produce song lyrics, the company that supplied the AI product holds copyright interest in the resulting composition of those lyrics. This argument could be reasonably supported by the requirement for an author to fix the work in a tangible medium of expression.<sup>60</sup> Thus, AI could qualify as either a joint author or independent author for copyright purposes.<sup>61</sup>

However, it is clear that using AI merely as a tool is consistent with the existing copyright law structure we see today, which protects the creative content of the human being. Under the Copyright Act, the author can “fix” the work “either directly or indirectly with the aid of a machine or device.”<sup>62</sup> The method that AI uses in creating works can be compared to a general arrangement of compiling data. Therefore, even the slightest human contribution to the creation of a song would still allow the human to claim sole authorship by qualifying as an “author” under the existing framework for copyrights.<sup>63</sup>

#### A. *Ideas Are Not Copyrightable*

To understand how AI is woven into the music space, it is essential that one understands exactly how music industry copyrights are protected. A song contains two separately copyrightable works: the sound recording and the underlying composition.<sup>64</sup> The U.S. Copyright clearly distinguishes the difference between the two copyrights:<sup>65</sup>

A musical work is a song’s underlying composition along with any accompanying lyrics. Musical works are usually created by a songwriter or composer. A sound recording is a series of musical, spoken, or other sounds

---

58. See Bridy, *supra* note 23, at 2 n.5.

59. See AUDOIR, *supra* note 52; see Bernard Marr, *How Artificial Intelligence (AI) Is Helping Musicians Unlock Their Creativity*, FORBES MAG. (May 14, 2021, 12:30 AM), <https://www.forbes.com/sites/bernardmarr/2021/05/14/how-artificial-intelligence-ai-is-helping-musicians-unlock-their-creativity>.

60. See Guadamuz, *supra* note 57.

61. *Id.*

62. 17 U.S.C. § 102(a).

63. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); see also 17 U.S.C. § 106.

64. *What Musicians Should Know About Copyright*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/engage/musicians/> (last visited Dec. 15, 2022).

65. *Id.*

fixed in a recording medium, such as a CD or digital file, called a ‘phonorecord.’ Sound recordings can be created by the recording’s performer, the producer, or others.<sup>66</sup>

To hold copyright ownership for the composition of the song, you must have written the work.<sup>67</sup> Songwriters and producers usually attach a publishing company that retains the composition copyright to the final product and grants exclusive licenses.

It is fundamentally known that copyright only protects a tangible expression of an author’s idea and that ideas alone are not copyrightable.<sup>68</sup> An example illustrating this is a copyright theory called the “scènes à faire” doctrine.<sup>69</sup> Scènes à faire has been defined as “A stock character, setting, or event that is common to a particular subject matter or medium.”<sup>70</sup> As noted by Leslie Kurtz, early cases show that copyright protection did not traditionally extend to “stock situations, plot elements, and incidents that existed in the common stock before the plaintiff’s story was written.”<sup>71</sup> Like scènes à faire, the merger doctrine also posits that when there are only so few conceivable ways to express a given idea, that idea and its expression merge as one and are, thus, uncopyrightable.<sup>72</sup>

Courts have consistently held that independent creation is not enough to grant copyright protection.<sup>73</sup> In *Feist Publications, Inc.*, the threshold issue was “whether the white pages of a telephone directory were an ‘original work of authorship’ for statutory purposes.”<sup>74</sup> The Supreme Court held, “As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.”<sup>75</sup> The Court also emphasized the “well-established” principle that “facts are not

---

66. *Id.*

67. See Kurl Dahl, *The 2 Copyrights in a Song (and How to Make More Money from Them)*, LAWYER DRUMMER, <https://lawyerdrummer.com/2020/10/the-2-copyrights-in-a-song/> (last visited Oct. 31, 2023); 17 U.S.C. § 102(a)(2).

68. Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 551 (1990).

69. See UNITED STATES COPYRIGHT OFFICE, *supra* note 9, § 313.3(I); see generally Torrean Edwards, *Scènes à Faire in Music: How an Old Defense Is Maturing, and How It Can Be Improved*, 23 MARQ. INTELL. PROP. L. REV. 105 (2019).

70. See UNITED STATES COPYRIGHT OFFICE, *supra* note 9, Glossary, at 18.

71. Leslie A. Kurtz, *Copyright: The Scenes a Faire Doctrine*, 41 FLA. L. REV. 79, 86 (1989).

72. See Michael D. Murray, *Copyright, Originality, and the End of the Scènes à Faire and Merger Doctrines for Visual Works*, 58 BAYLOR L. REV. 779, 781 (2006).

73. See Bridy, *supra* note 23, at 7; *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 n.13 (2d Cir. 1951) (quoting F. E. SKONE JAMES, *COPINGER ON THE LAW OF COPYRIGHT* 40–44 (7th ed. 1936)).

74. See Bridy, *supra* note 23, at 7.

75. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991).

copyrightable.”<sup>76</sup> As stated in the Constitution, copyright’s objective is to “promote the Progress of Science and useful Arts.”<sup>77</sup> Authors are ensured that their original expression of a given idea will be protected under copyright while allowing others to freely create their own unique expression of that identical idea or concept.<sup>78</sup>

### B. *AI Merely Provides “Building Blocks”*

Like ideas, AI merely provides its users the components that, themselves alone, cannot be protected under copyright. As cited in *Merger and Scènes à Faire: Two Defenses to Substantial Similarity in Copyright Litigation*, examples of uncopyrightable ideas are “computer software and numbering cases where external factors or functional choices dictate the expression.”<sup>79</sup> Similarly to computer software, algorithms creating the AI software program have only one or a few ways of expressing that final “idea” or “product” such as the song lyrics or musical beat. Where that is the case, we can then argue that the merger doctrine defeats the infringement claim against the AI companies because the idea and expression have now merged into one and hold no copyright interest for the AI.<sup>80</sup> While some may cite the court’s reasoning in *Feist* that “only the compiler’s selection and arrangement may be protected; the raw facts may be copied at will,”<sup>81</sup> here, the “compiler” is the human that is prompting the AI to generate the work. The AI is merely pulling facts and ideas from its programmed database to compile that work. Without the human’s intellectual command in feeding the AI an idea to formulate such compilations, the AI would have little importance.

Although some have argued that ideas cannot exist without expression, here, the expression of that idea is the human’s direction in guiding the AI to assemble the final product.<sup>82</sup> While the underlying code prompts AI to compile information together, those components alone cannot be protected under copyright due to the idea and expression merging as one. Bridy makes a valuable point noting that, while machine-learning devices are now more equipped to process information than their predecessors, “they still rely on

---

76. *Id.* at 344.

77. U.S. CONST. art. I, § 8, cl. 8.

78. *Feist Publ’ns., Inc.*, 499 U.S. at 349–50.

79. *Merger and Scènes à Faire: Two Defenses to Substantial Similarity in Copyright Litigation*, TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT LLP, at 1 (2016), [http://www.thsh.com/documents/December\\_2016/Merger-and-Sc%C3%A8nes-%C3%A0-FaireTwo.pdf](http://www.thsh.com/documents/December_2016/Merger-and-Sc%C3%A8nes-%C3%A0-FaireTwo.pdf) [<https://perma.cc/J7FA-DPD2>].

80. *See id.*

81. *Feist Publ’ns., Inc.*, 499 U.S. at 350.

82. *See Jones, supra* note 68 at 552.

humans in the first instance to dictate the rules according to which they perform.”<sup>83</sup> Similar to a photographer using a digital camera to capture its original vision, an artificial machine is created by programmers and used to achieve the users’ unique vision. Like in *Burrow-Giles*, where the court emphasized the author’s role as being the “cause of the picture,” the one who shapes its ultimate vision,<sup>84</sup> one could argue that without the human acting as the motivating power “superintend[ing] the [photograph’s] arrangement,” the photograph would not exist.<sup>85</sup> Thus, like the copyright doctrines of merger and scènes à faire, songwriters will hold a strong defense against a claim for AI asserting authorship in an AI-generated work, showing that the AI is merely providing facts and ideas, which are in turn, assembled by the human operating the device.<sup>86</sup>

Today, numerous AI tools exist for individuals to generate work while also preserving the user as the sole author of the final product.<sup>87</sup> A comparable example of AI being used as a tool for individuals to generate work is a program called “Wordtune.”<sup>88</sup> Wordtune is acclaimed as “the first AI-based writing companion” that rectifies grammatical errors within sentences and proposes alternative wording to refine the user’s original writing, thereby improving the clarity and expression of the intended idea or assertion.<sup>89</sup> Under the website’s “frequently asked questions” page, the AI algorithm is programmed and instructed to “make suggestions on your writing from its completely original words.”<sup>90</sup> Like a songwriter using AI to expand their artistry and develop their sound in an otherwise unreachable way, Wordtune has been used as an AI tool to provide the “building blocks” to effectively articulate and advance the human operator’s writing skills.

#### IV. POLICY CONSIDERATIONS

##### A. *The Dangers of Granting AI Copyright Interest in AI-Generated Work*

---

83. Bridy, *supra* note 23, at 10.

84. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884).

85. *Id.*

86. *See id.*

87. *See, e.g.*, ARTICLE FORGE, <https://www.articleforge.com> (last visited Dec. 15, 2022).

88. *See generally* WORDTUNE, <https://www.wordtune.com> (last visited Dec. 15, 2022).

89. *AI21 Labs Comes Out of Stealth and Launches First Deep-Tech Writing Assistant, Wordtune*, BUS. WIRE (Oct. 27, 2020, 9:00 AM), <https://www.businesswire.com/news/home/20201027005162/en>.

90. *Wordtune FAQ*, WORDTUNE, [www.wordtune.com/faq](http://www.wordtune.com/faq) (last visited Dec. 15, 2022).

by *Broadening the Scope of “Authorship”*

As research and technological advancement for AI continues, its inescapable appeal has impacted nearly every industry.<sup>91</sup> Those who are thriving in the entertainment space are now faced with the jarring realization that powerful artwork derived from innate human use and expression might be bargained for. Theorists argue that legal protections over intellectual property “must be given to creators in order to give them the incentive to create their works.”<sup>92</sup> For many artists, their primary impulse is to express themselves through innovative and creative work and share that work with others.<sup>93</sup> This deep desire to express themselves resides in all artists, and what truly drives their innate impulse to continue to produce work.<sup>94</sup>

Over generations, our society has found a deep need to preserve human expression. In *Burrow-Giles*, the Court held that the photograph was shown “to be an original work of art” of the “plaintiff’s intellectual invention,” a work “for which the constitution intended that congress should secure to him the exclusive right to use, publish and sell.”<sup>95</sup> Some of these AI programs have raised valid concerns among the music community, more specifically, fearing that the machine learning ability of AI has the capacity to replace songwriting and producing because it has an “endless stream of ideas, that never gets tired.”<sup>96</sup> A human’s natural capacity to generate quality work may be fairly stunted by biological or natural forces. For example, AI is not confronted with the obstacles that would ordinarily hinder a song producer’s ability to generate quality work in mass quantities due to human constraints concerning time, physical and emotional labor, and access to sound equipment. AI’s allure lies in its ability to dramatically reduce labor and time costs by efficiently undertaking complex and repetitive tasks that would ordinarily be physically and mentally strenuous on a human being.

Critics of AI point out that AI’s capacity to mimic key human cognitive functions stems from subjective judgments based on the human experience.<sup>97</sup> The unique and isolated behaviors distinct to human experience, such as feelings, memories, and fears, do not exist innately within AI. Moreover,

---

91. See West & Allen, *supra* note 2.

92. Seana Valentine Shiffrin, *The Incentives Argument for Intellectual Property Protection*, 4 J.L. PHIL. & CULTURE 49, 49 (2009).

93. *Id.* at 51.

94. *Id.*

95. *Burrow-Giles v. Sarony*, 111 U.S. 53, 60 (1884).

96. See Barrett & Ward, *supra* note 48 (although some are enthused by the prospect of a collaborator that is always available).

97. Jake Frankenfield, *A.I.: What It Is and How It Is Used*, INVESTOPEDIA, <https://www.investopedia.com/terms/a/artificial-intelligence-ai.asp> (Apr. 24, 2023).

scholars have identified apprehensions in public policy surrounding the governance of AI rights, noting that regulations by governments and industries may constrain the scope of AI's utility for its users.<sup>98</sup> Expanding the definition of "authorship" to include AI work-product under the Copyright Act idealizes a cost-benefit analysis approach regarding whether our society ought to forego authentic human expression by deifying saleable, hit song-making machines. The need for human creators could crumble due to the need to make a monetary profit and seek quantity over quality work. As a society, we would set a dangerous precedent if we granted authorship rights to AI-produced machine-learning works in the future. This departure from common sense may hurdle us into a dystopian future by suppressing human expression and artistic welfare.

*B. A Legal Limitation of AI's Copyright Interest in Preserving Creative Work's Socio-Emotional Impact*

Although fears about artificial intelligence surpassing human authenticity and creativity persist, it is indisputable that AI has significantly enhanced the creative process, serving as a valuable tool for creators to amplify their artistic endeavors. As technology advances, musicians are welcoming the idea of using newer, more advanced technology, such as AI, as an instrument to elevate their craft to new heights.<sup>99</sup> An artist's creative process can be greatly enhanced by integrating AI into it, enabling them to interact with the technology in a way that does not threaten their livelihood.<sup>100</sup>

Moreover, inventors of AI work remain incentivized to generate work due to legislative authority granting them intellectual property protection in patents.<sup>101</sup> The U.S. Constitution grants Congress the authority to provide intellectual property rights to both authors and inventors.<sup>102</sup> Authors are granted copyrights and inventors are granted patents.<sup>103</sup> It is clear that the founders intended to distinguish inventors from authors. With that in mind, AI technology could fall neatly within the scope of patent protection rather than copyright protection. AI-generated work is based on the algorithm that prompts the AI to act as a system or method rather than an author who is

---

98. See generally Travis, *supra* note 41.

99. See AREK SKUZA, *supra* note 47.

100. See, e.g., Paul Herrera, *Music and Artificial Intelligence: Implications for Artists and the Industry*, ROLLING STONE (July 27, 2022), <https://www.rollingstone.com/culture-council/articles/music-and-artificial-intelligence-implications-artists-and-the-industry-1388232/>.

101. See U.S. CONST. art. I, § 8, cl. 8.

102. *Id.*

103. *Id.*; *Burrow-Giles v. Sarony*, 111 U.S. 53, 56 (1884).

creating original work. Technology companies concerned with obtaining legal rights in the output of their AI product may very well seek patent protection to protect the algorithms or techniques that prompt the AI to produce a final work.

## V. CONCLUSION

As AI becomes more widespread, policymakers cannot remain passive when it comes to limiting the use of machine learning concerning copyright law. Pandora's box has been opened.<sup>104</sup> Technology is developing and auto-generating without the need for human input. With that in mind, our society must focus on the goal of implementing policy regulations that maintain the ethical balance and purpose for authenticity over revenue by limiting AI's use as a tool and applying it to our advantage. Humans using AI to generate art is consistent with the existing structure of copyright law, ensuring that the human is the sole author, regardless of whether AI-generated art is acknowledged as "authorship." This legal Note cautions against extending the scope of authorship to include artificial intelligence. Although there are concerns about AI's growing influence in entertainment, policy arguments can be made in support of AI's tremendous value in nurturing art if it is limited in scope to ensure human expression and authenticity are preserved. Thus, songwriters who use AI as a tool to generate art should remain the sole author of the final product of their work.

---

104. See N.S. Gill, *Understanding the Significance of Pandora's Box*, THOUGHTCO (June 27, 2019), <https://www.thoughtco.com/what-was-pandoras-box-118577>.