Artificial Intelligence and Songwriting

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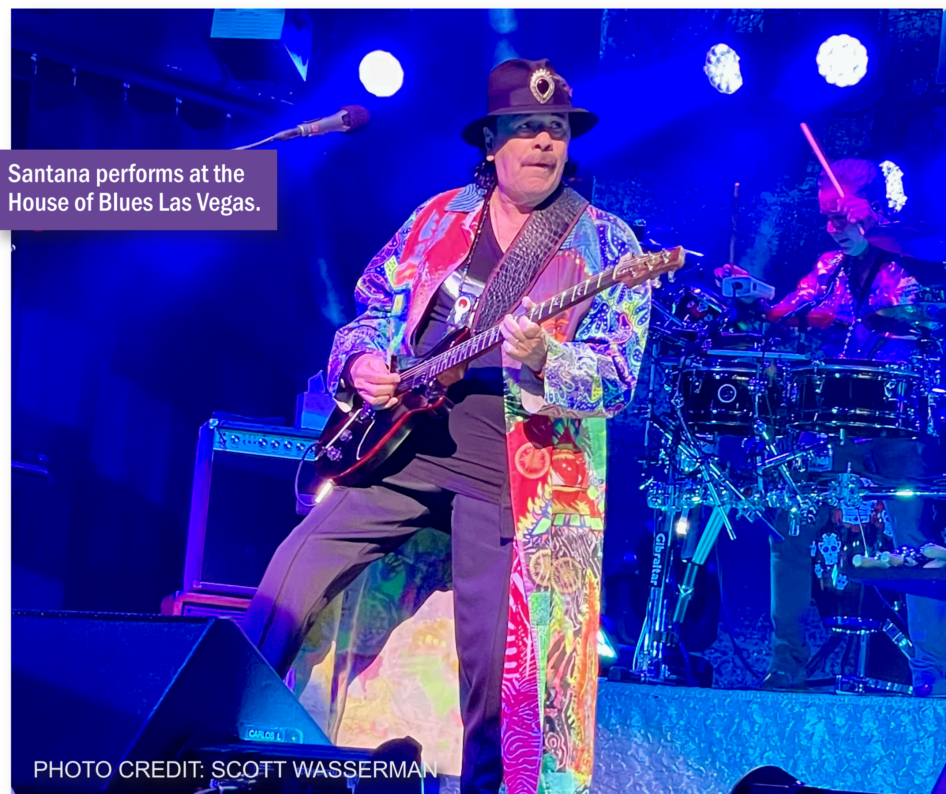

Santana performs at the House of Blues Las Vegas.

AI (Artificial Intelligence) is everywhere now. No doubt you have seen countless social media posts containing AI artwork. Indeed, there are numerous websites and apps where you can type in whatever phrase your imagination conjures, and within seconds an artificially created "painting" brings your imagination to life. While this technology can often be harmless and even fun (who doesn't want to see a faux-oil painting of Chewbacca pitching for the New York Yankees?), there are obvious concerns with privacy, copyright, and image and likeness inherent with this technology.

The world of music has also been impacted by AI. Indeed, on YouTube one can find AI-generated songs featuring Johnny Cash singing Taylor Swift or Frank Sinatra singing Nirvana. Speaking of Nirvana, Kurt Cobain's legacy became further intwined with the future of AI-generated music in 2021 when an entirely "new" Nirvana "song" entitled "Drowned in the Sun" was created using AI technology. While some may find this technology amusing, there are inherent legal questions with it. Is it copyright infringement to use AI to create a song "in the style of" a favorite artist? Inevitably we will reach a point where non-musicians will be able, with the push of a few buttons, to "write" an AI-generated "song" by their favorite artist. At what point do AI-generated songs cross the line from fun playfulness

to full-blown copyright infringement? As these questions make clear, the dawn of AI-generated music means a brave new world for 21st century intellectual property rights scholars. Luckily, however, a firm foundation in established copyright law can provide us with guidance.

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“Copyright” literally means the right to copy but has come to mean that body of exclusive rights granted by law to copyright owners for protection of their work.[1] Copyright law is embedded in the U.S. Constitution, Art. I, Sec. 8, and allows copyright holders the exclusive right to their respective writings and discoveries.

The Copyright Act’s primary objective is to encourage the production of original literary, artistic, and musical expression for the public good.[2] The Copyright Act achieves this objective “by establishing a marketable right to the use of one’s expression,” thus creating an “economic incentive to create and disseminate ideas.”[3]

Defenders of AI-generated music are probably already screaming “fair use!” in their minds right now. Indeed, the aforementioned “new” Nirvana song was the brainchild of Over the Bridge, a non-profit group seeking to raise awareness of mental illness. This situation would grant a fair use exemption under the “commercial” and/or “nonprofit educational” category set forth in 17 USC § 107, which explicitly creates four points of analysis for fair use of copyrighted materials:

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.

Diana Krall performs at Grand Sierra Resort in Reno.

Fair use could also provide a defense to AI-generated songs that are clear parodies of original works, subject to considerations of the work’s commercial nature (see, *infra*). But what about our musical doomsday scenario – a bleak future wherein the true original works of musical geniuses are simply flakes of gold amidst the infinite sands of AI-created derivative drivel? A dystopian future where any fool with an app can mindlessly push buttons and “create” a new John Lennon composition? What if such compositions are then marketed and sold? The crass commercialization of artistically vapid derivate musical works is nigh upon us and may already be here.

From an artistic perspective, we can cling to the words of past masters such as Bob Dylan for comfort:

> All these people that you mention
> Yes, I know them, they’re quite lame
> I had to rearrange their faces
> And give them all another name[4]

But is there any legal recourse for copyright holders against such

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technology? One factor courts have looked at for prior infringement issues is whether the work is "transformative" of the original.[5] In *Campbell*, the copyright holders of the Roy Orbison song "Oh, Pretty Woman" sued the rap group 2 Live Crew for copyright infringement for their song "Pretty Woman." The Court of Appeals held that the commercial nature of the parody rendered it presumptively unfair under the first of the 17 USC § 107 factors, and by taking the "heart" of the original song and making it the "heart" of a new work, 2 Live Crew had taken too much under the third § 107 factor.[6] The U.S. Supreme Court reversed, holding that "Pretty Woman" was a fair use commercial parody within the meaning of 17 USC § 107. Crucially, the court reasoned that:

> the enquiry focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is "transformative," altering the original with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[7]

Application of this "transformative" analysis may bode well for defenders of AI-created music technology. Indeed, the aforementioned "new" Nirvana song, while clearly a derivative work, is nevertheless a "new" song, not just "Smells Like Teen Spirit" with different lyrics. But even if AI-created "new" songs are facially distinct from the predecessor artists they mimic, is there legal precedent for copyright infringement against the overall "feel" and/or "style" of an artist? The answer to this question answer may lie in perhaps the most controversial copyright opinion in modern history. In 2013, a jury in federal district court in Los Angeles found that "Blurred Lines," the world's best-selling single in 2013, infringed upon the copyright in Marvin Gaye's 1977 hit song "Got to Give It Up." Musicologist Judith Finell, on behalf of the Gayes, opined that there was a "constellation" of eight similarities between the two songs.[8] On appeal the Ninth Circuit noted that in copyright infringement claims a two-part test for "substantial similarity" is applied: an extrinsic test and an intrinsic test. The objective extrinsic test considers whether two works share a similarity of ideas and expression. The subjective intrinsic test asks "whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar."[9]

Ironically, while the "Blurred Lines" decision has been universally condemned by songwriters and creatives alike, it could in fact be the precedent that preserves songwriter rights against the impending onslaught of AI-created derivative works. The decision set forth a precedent wherein a copyright infringement claim can be successful even if an artist (or potentially an AI app) captures "the feel" of a song and creates a derivative work that channels "the essence" of the original.

Another case addressing the issue of "sounding" like another artist was a legal saga involving John Fogerty, lead singer/songwriter of Jeffrey Lebowski's favorite band Creedence Clearwater Revival. Fantasy Records held exclusive publishing rights and copyright to Fogerty's music. In 1985, Fogerty released his solo album "Centerfield" containing the song "The Old Man Down the Road." Fantasy sued, alleging that Fogerty's new song was merely "Run Through the Jungle" with new words.[10] At trial, the jury returned a verdict in favor of Fogerty who famously played his guitar in the courtroom in order to demonstrate the differences in the two songs.

While the appellate decision *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) mainly addresses the issue of attorney's fees, the opinion establishes some important precedent in the field of copyright, especially as it might anticipatorily apply to AI-generated songs.

> Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible…. the successful defense of "The Old Man Down the Road" increased public exposure to a musical work that could, as a result, lead to further creative pieces.
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> *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994)

The *Fogerty* matter dealt with the rather unique issue of a copyright holder allegedly sounding like himself. Germane to the issue of AI, it also provides valuable precedent for issues involving derivative musical works. As attorneys facing the future of AI copyright infringement claims, we must be mindful of the 17 USC § 107 factors and be prepared to analyze the "transformative" nature of these "new" songs.

ENDNOTES:

1. www.copyright.gov/help/faq/definitions.html
2. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994)
3. *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985).
4. Bob Dylan, "Desolation Row" from Highway 61 Revisited.
5. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)
6. *Id.*
7. *Id.* at 569-570.
8. *Williams v. Gaye*, 895 F.3d 1106, 1117 (9th Cir. 2018)
9. *Id. at 1119*
10. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 520 (1994)

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