

US Copyright Office Guidance on Royalty Eligibility of Musical Works Generated Using AI

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As the use of artificial intelligence (AI) to generate new works has expanded rapidly, the U.S. Copyright Office has sought to keep pace by issuing guidance on the application of copyright law to such works. On April 20, 2023, the Copyright Office published a letter (the MLC Letter) sent to the CEO of the Mechanical Licensing Collective (MLC) containing guidance on how the MLC should handle royalty distributions for musical works created through the use of generative AI.

Background on the MLC

Under Section 115 of the Copyright Act, copyright holders of nondramatic musical works (*i.e.*, songs and musical compositions that were not created for use in a motion picture, musical play or opera) are due a “mechanical royalty” each time their work is reproduced, including when it is streamed on an interactive streaming platform. The Copyright Act provides that a “mechanical licensing collective” designated by the Register of Copyrights collect and process such royalties. The Music Modernization Act of 2018 designated the MLC, a nonprofit organization, to serve as that collective, and since 2021, the MLC has been responsible for administering blanket mechanical licenses to digital service providers (such as streaming services) and download services in the United States and for collecting royalties due under those licenses to pay songwriters, composers, lyricists and music publishers.

AI Guidance to the MLC

Copyright Protection for AI-Generated Music

The question before the Copyright Office and addressed in the MLC Letter was how the MLC should handle nondramatic musical works generated by AI. The Copyright Office reiterated in the MLC Letter the position it took in its March 2023 guidance regarding AI works; namely, that where the “traditional elements of authorship” are fully AI-generated, including in cases where a human’s sole role was to input a text prompt to generate the work, in this case a musical work, there is insufficient human authorship to warrant copyright protection.¹

The MLC Letter acknowledges that the use of AI is not itself fatal to copyright protection since that protection could still be available where a human selected or arranged AI-generated material in a sufficiently creative way such that “the resulting work as a whole constitutes an original work of authorship” or where a human modified AI-generated work to a sufficient degree to meet the standard for copyright protection. Applying these exceptions to the world of music creation, the MLC Letter notes that “there is no dispute” that the use of tools by humans such as “digital audio workstations, sequencers, and arpeggiators” does not necessarily render a work to be unprotectable from a copyright perspective, provided that the final work “is the product of human authorship.”

Mechanical Royalties for AI-Generated Works

Consistent with the foregoing analysis, the Copyright Office takes the position in the MLC Letter that since royalty payments under Section 115 of the Copyright Act are only available to those who claim ownership of a musical work protected by copyright, such royalties are not available for AI-generated works that lack the necessary human authorship.

¹ See our March 16, 2023, client alert “[Copyright Office Issues Guidance on AI-Generated Works, Stressing Human Authorship Requirement.](#)”

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In the MLC Letter, the Copyright Office states that where circumstances reasonably indicate that a musical work registered in the collective's database lacks the human authorship necessary to qualify for copyright protection, the collective may investigate the work's copyrightability and refrain from issuing any associated royalties pending the investigation. Interestingly, the Copyright Office cites as such circumstances not only instances where a songwriter acknowledges the AI-generation, but also where songwriters claimed that they created "an extraordinary number of musical works in an unusually short time period."

In such cases, the Copyright Office advised the MLC to treat a work that appears to lack requisite human authorship as an "anomal[y]" and place associated royalties "in [s]uspense" while the MLC researches the issue, consistent with the MLC *Guidelines for Adjustments*. According to the Copyright Office, this research could include communicating with the individual or entity claiming ownership of the work or asking the Copyright Office whether the work has been registered and whether its record includes any disclaimers or notes.

If, after its investigation, the MLC determines that the work qualifies for copyright protection and, subsequently, a mechanical license, then the MLC should distribute any withheld royalties and interest to the applicable copyright owner. Conversely, if the MLC determines that the work does not qualify for copyright protection after its investigation, the Copyright Office advises that the MLC notify the individual or entity claiming ownership of the work of the MLC's determination and inform the individual or entity that the associated royalties will be subject to an adjustment, both of which can be challenged in accordance with the MLC's policies. The Copyright Office states that all disputed royalties and interest should remain suspended until proceedings are resolved.

Key Takeaways

The MLC Letter is an example of the numerous ways in which AI-generated works can invoke aspects of the Copyright Act. The MLC Letter also highlights that the line between a human-generated work that uses AI (and is protectable with a copyright) and an AI-generated work (where copyright protection is not available) requires a "case-by-case" analysis and may not always be clear. We expect that as uses of AI become more sophisticated, these questions will become more complicated.

The MLC Letter also signals to songwriters, composers, lyricists and music publishers who make significant use of AI-technology that whether their resulting work will be entitled to receive a mechanical license and, subsequently, be eligible for royalty payments will be determined on a case-by-case basis and may require further inquiry conducted by the Copyright Office and/or the MLC, which may result in delays on these decisions.

The MLC Letter is just one of many ways the Copyright Office is addressing topics related to AI and AI-generated works. Earlier this year, the Copyright Office launched an AI initiative, which includes four public AI listening sessions focused on the use of AI to generate works in creative industries. The listening sessions include "Literary Works, Including Software" (held on April 19, 2023), "Visual Arts" (held on May 2, 2023), "Audiovisual Works" (scheduled for May 17, 2023) and "Music and Sound Recordings" (scheduled for May 31, 2023).²

² For more information, see the U.S. Copyright Office's [Spring 2023 AI Listening Sessions](#).