

# Musicians Using AI Have A Long Road Ahead With Royalties

By **Stuart Levi, Shannon Morgan and MacKinzie Neal** (June 23, 2023, 1:37 PM EDT)

As the use of artificial intelligence to generate new works has expanded rapidly, in recent months 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, the Copyright Office published a letter sent to the CEO of the Mechanical Licensing Collective containing guidance on how they should handle royalty distributions for musical works created through the use of generative AI.

## Background on the Mechanical Licensing Collective

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 directs the mechanical licensing collective designated by the Register of Copyrights to collect and process such royalties. The Music Modernization Act of 2018 designated the Mechanical Licensing Collective, a nonprofit organization, to serve as that collective.

Since 2021, the Mechanical Licensing Collective has been responsible for administering blanket mechanical licenses to digital service providers — such as streaming services — and download services in the U.S. and for collecting royalties due under those licenses to pay songwriters, composers, lyricists and music publishers.

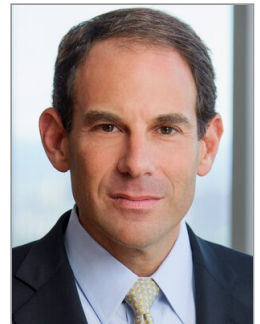
## AI Guidance to the Mechanical Licensing Collective

### *Copyright Protection for AI-Generated Music*

The question before the Copyright Office and addressed in the letter was how the Mechanical Licensing Collective should handle nondramatic musical works generated by AI.

The Copyright Office reiterated in the letter the position it took in its March 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 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.



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Applying these exceptions to the world of music creation, the 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."

However, similar to the Copyright Office guidance from March, the letter notably does not address the practical challenges in determining when human input is sufficient for a resulting work to be copyrightable. In recent months, the number of ways in which AI-generated content has been incorporated into human-generated musical works has both expanded and become more nuanced.

Absent further guidance from the Copyright Office, creators may be uncertain as to the copyrightability of their work or their expectation to obtain a mechanical royalty.

Until the Copyright Office provides more definitive guidance, creators looking to protect and monetize works that leverage AI, including through the Mechanical Licensing Collective, will need to establish that their musical works include sufficient human authorship to justify protection under U.S. copyright law and a right to royalties from the collective.

### ***Mechanical Royalties for AI-Generated Works***

The Copyright Office takes the position in the 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.

In the 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 Mechanical Licensing Collective to treat a work that appears to lack requisite human authorship as an anomaly and place associated royalties "in suspense" while the collective researches the issue, consistent with the Mechanical Licensing Collective 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. It is not clear in the letter whether a new oversight board will be created in order to oversee these decision-making processes.

According to the letter, if, after its investigation, the collective determines that the work qualifies for copyright protection and, subsequently, a mechanical license, then the collective should distribute any withheld royalties and interest to the applicable copyright owner.

Conversely, if the collective determines that the work does not qualify for copyright protection after its investigation, the Copyright Office advises that the collective notify the individual or entity claiming ownership of the work of the collective'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 collective's policies.

The Copyright Office states that all disputed royalties and interest should remain suspended until proceedings are resolved.

The dispute resolution process detailed in the letter may likely result in the Mechanical Licensing Collective playing a larger role in the determination of whether an artist can receive mechanical royalties for a musical work that leverages AI technology.

In addition to creating another hurdle for copyright holders to demonstrate a particular work has a sufficient degree of human authorship to benefit from copyright protection, the dispute resolution process proposed by the letter could result in the collective developing its own standard of review that differs from that of the Copyright Office.

The letter does not address whether the Copyright Office and the Mechanical Licensing Collective intend to work together to reconcile this issue, or whether further guidance will be provided.

Relatedly, the letter to the Mechanical Licensing Collective leaves open what happens if there is a difference in opinion between the collective and the Copyright Office regarding a work's copyrightability.

For example, the letter does not address the potential scenario in which the Copyright Office has registered a work that incorporates AI, but the Mechanical Licensing Collective, after its investigation, believes that same work does not qualify for copyright protection due to the AI-generated components.

It is not clear, in such a scenario, whether the Copyright Office would reevaluate its grant of registration in light of the collective's determination or, further, whether the copyright owner would be responsible for foregoing their mechanical royalties despite having a copyright registration with the Copyright Office.

### **Key Takeaways**

The widespread use of AI continues to raise novel legal issues, particularly within copyright law. The letter to the Mechanical Licensing Collective is an example of the numerous ways in which AI-generated works can invoke aspects of the Copyright Act and the impact AI may have on the future of the music industry.

In particular, the letter 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.

Given the number of new AI-backed technologies that have been developed over just the course of a few months, this distinction may become more complex, as the line between human authorship and AI-generation becomes less clear.

This should signal to songwriters, composers, lyricists and music publishers who make significant use of AI technology that whether their resulting work will be eligible for royalty payments will be determined case-by-case and may require further inquiry conducted by the Copyright Office and/or the Mechanical Licensing Collective, which may result in delays on these decisions.

Further, the case-by-case analysis may also result in differing opinions on whether a work that incorporates AI is eligible for copyright protection. Several recent lawsuits are currently challenging the permissibility of AI models under copyright law; however, none of these lawsuits are focused on the issue of the copyrightability of a resulting work.

We expect that as uses of AI become more sophisticated, these questions will become more complicated, and further guidance from the Copyright Office — and courts — will be needed.

The 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 that focused on the use of AI to generate works in creative industries led by a panel of industry participants.

The listening sessions included "Literary Works, Including Software" held on April 19, "Visual Arts" held on May 2, "Audiovisual Works" held on May 17 and "Music and Sound Recordings" held on May 31.[2]

In addition to the listening sessions, the Copyright Office also plans to publish a notice of inquiry

soliciting public comments on various copyright issues arising from the use of AI later this year.

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*[1] See our March 16, 2023, client alert "Copyright Office Issues Guidance on AI-Generated Works, Stressing Human Authorship Requirement."*

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