

Fair Use or Foul Play? Generative AI Music Creation Services in the Copyright Crossfire

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*“[W]hen used responsibly, AI has enormous potential to advance human creativity When used irresponsibly, AI poses enormous threats to our ability to protect our privacy, our identities, our music and our livelihoods.”*¹

I. INTRODUCTION

Before the release of Taylor Swift’s *The Tortured Poets Department*, snippets of “leaked” songs from the album circulated on social media.² When Swift released the album and these “leaked” songs were not included, however, fans realized they were not from *The Tortured Poets Department*.³ They were Artificial Intelligence (AI) generated by content creators.⁴ The robotic and emotionless sound of “Taylor’s” voice indicated that the songs were AI-generated; nevertheless, the disappointment of some fans that these songs were fake demonstrates the power of generative AI (GAI) tools in the music creation process.⁵ At the same time, the positive reception among some Swift fans to the AI-generated songs raises the specter that AI-generated music could substitute for human-created music.⁶

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** I finalized this Note before Universal Music Group settled its lawsuit with Udio. See Universal Music Settles Udio Lawsuit, Strikes Deal for Licensed AI Music Platform, MUSICBUS. WORLDWIDE (Oct. 30, 2025), <https://www.musicbusinessworldwide.com/universal-music-settles-udio-lawsuit-strikes-deal-for-licensed-ai-music-platform/> [<https://perma.cc/B9FN-KBN8>] (reporting on lawsuit settlement). Additionally, this Note does not address the record labels’ motion to amend their Complaint against Suno to add a new cause of action based on an alleged violation of 17 U.S.C. § 1201(a). See Plaintiffs’ Motion for Leave to Amend Complaint, UMG Recordings, Inc. v. Suno, Inc., No. 1:24-cv-11611 (D. Mass. Oct. 8, 2025), ECF No. 134.

1. Artist Rights Alliance, *200+ Artists Urge Tech Platforms: Stop Devaluing Music*, MEDIUM (Apr. 1, 2024), <https://artistrightsnow.medium.com/200-artists-urge-tech-platforms-stop-devaluing-music-559fb109bba-c> [<https://perma.cc/X8NK-JDFJ>].

2. See Kristine Villarroel, *Is This AI? Taylor Swift, Drake, and a Music Industry in Trouble*, TEEN VOGUE (June 12, 2024), <https://www.teenvogue.com/story/ai-generated-pop-culture-guide> [<https://perma.cc/J9MR-PM95>] (discussing spread of AI-generated songs online and how to identify AI-generated music).

3. See *id.* (chronicling release of Swift’s album).

4. See *id.* (noting spread of AI-generated songs allegedly from Taylor Swift’s unreleased album).

5. See *id.* (highlighting fan reactions to “leaked” songs from Swift’s album and AI-generation tells from those songs).

6. See Villarroel, *supra* note 2 (listing fan reactions to “leaked” songs).

While it is unclear who created the AI-generated songs and how they created them, musicians and nonmusicians have used GAI music creation services to generate music similar to these songs.⁷ GAI music creation services construct models with “neural networks” that learn from files inputted into their models and create audio files based on user instructions.⁸

While GAI is a valuable tool in the creative process—for example, by inspiring musicians’ pieces—there are questions regarding the legality of these services.⁹ Two GAI music creation services, Suno and Udio, face lawsuits in federal court from major recording companies alleging the services infringed on their copyrighted sound recordings.¹⁰ The recording companies claim that Suno and Udio used their copyrighted music to train Suno and Udio’s AI models without permission.¹¹

While Suno and Udio conceded in their Answers that they trained their models on some of the record labels’ copyrighted sound recordings, the companies argue that the doctrine of fair use protects their use of the songs.¹² Fair use permits the

7. See *id.* (noting one TikTok user claimed to have created songs allegedly from Taylor Swift’s album); Yan Wu, *Why Musicians are Smart to Embrace AI*, WASH. POST (Aug. 27, 2024), <https://www.washingtonpost.com/opinions/interactive/2024/music-ai-creativity/> [https://perma.cc/UQ84-5W6V] (highlighting musicians’ usage of GAI music creation services in creating music). People have adopted AI tools exponentially in recent years. See Statista Rsch Dep’t, *Number of AI Tool Users Worldwide From 2020 to 2031*, STATISTA (Aug. 15, 2025), <https://www.statista.com/forecasts/1449844> [https://perma.cc/LX9Q-PNUP] (demonstrating doubling of AI tool users globally from 2020 to 2023). The rise in AI usage correlates with the increasing spread of AI-generated music online. See Jewly Hight, *AI Music Isn’t Going Away. Here are 4 Big Questions About What’s Next*, NPR (Apr. 25, 2024), <https://www.npr.org/2024/04/25/1246928162/generative-ai-music-law-technology> [https://perma.cc/5CN7-ZFBU] (highlighting viral music created using GAI in recent years); Ed Newton-Rex, *It’s Time for Streaming Services to Act on AI Music*, MUSIC BUS. WORLDWIDE (Aug. 29, 2024), <https://www.musicbusinessworldwide.com/its-time-for-streaming-services-to-act-on-ai-music/> [https://perma.cc/28T4-EZDE] (observing presence of AI-generated music on streaming platforms).

8. See Eric Sunray, Article, *Train in Vain: A Theoretical Assessment of Intermediate Copying and Fair Use in Machine AI Music Generator Training*, 13 AM. U. INTELL. PROP. BRIEF 1, 6-7 (2021) (describing how AI music generators use neural networks). See generally David W. Opderbeck, *Copyright in AI Training Data: A Human-Centered Approach*, 76 OKLA. L. REV. 951 (2024) (explaining how machine learning systems use data inputs).

9. See Wu, *supra* note 7 (explaining how GAI has inspired musicians’ original compositions); Emily Price, *RIAA Sues Popular AI Song Generators for Training on Major Artists’ Work*, PC MAG (June 24, 2024), <https://www.pcmag.com/news/riaa-sues-popular-ai-song-generators-for-training-on-major-artists-work> [https://perma.cc/DC5L-D2WQ] (discussing accusations of copyright infringement against GAI music creation services).

10. See Complaint & Demand for Jury Trial at 13, UMG Recordings, Inc. v. Suno, Inc., No. 1:24-cv-11611 (D. Mass. June 24, 2024), ECF No. 1 [hereinafter Suno Compl.] (asserting outputs from Suno demonstrate use of copyrighted audio in model’s training sets); Complaint & Demand for Jury Trial at 13, UMG Recordings, Inc. v. Uncharted Labs, Inc., 1:24-cv-04777 (S.D.N.Y. June 25, 2024), ECF No. 9 [hereinafter Udio Compl.] (claiming music generated from Udio demonstrates use of copyrighted audio in model’s training sets).

11. See Suno Compl., *supra* note 10, at 12 (stating belief Suno used copyrighted sound recordings to train model without permission); Udio Compl., *supra* note 10, at 12 (asserting Udio used copyrighted sound recordings when training its model without permission).

12. See Answer at 5, 8-9, UMG Recordings, Inc. v. Suno, Inc., No. 1:24-cv-11611, (D. Mass. Aug. 1, 2024), ECF No. 28 [hereinafter Suno Answer] (asserting fair use doctrine for use of copyrighted works); Answer at 4-5, 8, UMG Recordings, Inc. v. Uncharted Labs, Inc., 1:24-cv-04777, (S.D.N.Y. Aug. 1, 2024), ECF No. 26 [hereinafter Udio Answer] (making fair use defense).

usage of copyrighted works that align with copyright law's objective of promoting the advancement of science and the arts without excessively diminishing the motivation to create.¹³ While scholars speculated about what might occur if litigants levied copyright infringement claims against operators of GAI services, courts must now grapple with such claims.¹⁴

To analyze how courts should assess a fair use defense in the context of GAI music creation services, this Note will first discuss the purpose of U.S. copyright law and the development of the fair use doctrine.¹⁵ Next, the Note will provide an overview of how copyrights in sound recordings operate and why copyright holders pursue these protections.¹⁶ Additionally, this Note will explain how GAI functions, how GAI music creation companies have commercially exploited their services, and how musicians use GAI music creation services as tools in the creative process.¹⁷ This Note will then consider whether GAI music creation services that use copyrighted music to train their models without the permission of copyright owners can rely on the doctrine of fair use successfully, and if the services should change to better conform with U.S. copyright law.¹⁸ Finally, this analysis compares two potential uses of GAI music creation services—using outputs for commercial exploitation and using the model as a tool for creating new music—to determine if fair use applies differently for these uses and if these uses of copyrighted works are the kind that U.S. copyright law intended to protect.¹⁹

13. See 17 U.S.C. § 107 (adopting limitations on copyright owner's exclusive rights); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990) (providing overview of fair use).

14. See Suno Compl., *supra* note 10, at 12 (stating belief that Suno used copyrighted sound recordings to train model without permission); Udio Compl., *supra* note 10, at 12 (asserting that Udio used copyrighted sound recordings when training its model without permission); see, e.g., Benjamin L. W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 COLUM. J.L. & ARTS 45, 48-49 (2017) (explaining challenges for copyright when analyzing potential claims regarding machine learning programs); Opderbeck, *supra* note 8, at 952-53 (noting implications of use of copyrighted materials for AI training); Sunray, *supra* note 8, at 4-5 (questioning whether GAI music creation services violate copyright law).

15. See *infra* Sections II.A-C (discussing history and purpose of U.S. copyright law and history and development of fair use).

16. See *infra* Section II.D (explaining how music copyrights operate and purpose of music copyrights).

17. See *infra* Sections II.E-F (describing how GAI functions and how GAI music creation services and users utilize these models). While previous pieces have discussed, from a theoretical perspective, whether GAI music creation services should be able to use the doctrine of fair use, this Note will review some of the arguments that GAI music creation services are making in court in response to copyright infringement claims. See Sunray, *supra* note 8, at 24 (analyzing GAI music creation services' potential fair use defense); Joseph Will, Note, *Rage Against the Machine: Copyright Infringement in AI-Generated Music*, 31 J. INTELL. PROP. L. 378, 379-80 (2024) (introducing and outlining Note); Sona Sulakian, 2022 *Eli Writing Competition Winning Essay: Protecting the Artist: Licensing in an AI-Generated Music Market*, 39 ENT. & SPORTS LAW. 137, 138-39 (2023) (arguing against fair use for GAI music creation services' music); Suno Answer, *supra* note 12, at 5, 31-32 (asserting fair use defense); Udio Answer, *supra* note 12, at 4-5, 34-35 (arguing for fair use).

18. See *infra* Sections III.A-B (analyzing GAI music creation services' fair use defense for current use and potential service changes).

19. See *infra* Sections III.A-C (comparing different uses of GAI music creation services).

II. HISTORY

A. *The Purpose of U.S. Copyright Law and The Copyright Act of 1976*

Congressional authority to create copyright law derives from Article I, Section 8, Clause 8 of the U.S. Constitution, which gives Congress the power to advance science and the arts by granting scientists and artists exclusive rights to their creations.²⁰ The philosophy behind the Copyright Clause is that encouraging individuals to create is the best way to advance the public good through the talents of creators and inventors in science and the arts.²¹

One of the major developments in U.S. copyright law was Congress's adoption of the Copyright Act of 1976.²² The Act preempted all state copyright

20. See U.S. CONST. art. I, § 8, cl. 8 (granting Congress power to protect intellectual property). Much of the founders' and framers' writings surrounding the Copyright Clause suggest that they included it to provide Congress the power to enact copyright and patent laws. See Craig W. Dallan, *Original Intent and the Copyright Clause: Eldred v. Ashcroft Gets It Right*, 50 ST. LOUIS U. L.J. 307, 314-15 (2006) (explaining framers' intent when including Copyright Clause in Constitution by reviewing contemporaneous writings).

21. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (noting framers' intended goals for copyright law); Kristelia Garcia, *Monetizing Infringement*, 54 U.C. DAVIS L. REV. 265, 278-79 (2020) (highlighting Supreme Court's characterization of copyright infringement). To promote the Copyright Clause's goal, Congress passed the Copyright Act of 1790, giving copyright owners the exclusive right to print, reprint, publish, and vend copies of their works, provided they complied with a strict set of formalities. See *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RSCH. LIBRS., <https://www.arl.org/copyright-timeline/> [<https://perma.cc/2G7W-GEJZ>] [hereinafter *Copyright Timeline*] (discussing purpose of Copyright Act of 1790); JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, *COPYRIGHT LAW CASES AND MATERIALS* 8 (6th ed. 2024) (highlighting place of Copyright Act of 1790 in history of U.S. copyright law). British copyright law, first codified in 1710 as the Statute of Anne, heavily influenced the Copyright Act of 1790. See Benjamin Ely Marks, Note, *Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-Salinger Decade Reconsidered*, 72 N.Y.U. L. REV. 1376, 1381 (1997) (reviewing development of fair use doctrine). The Statute of Anne provided authors an assignable right to control the printing and reprinting of books. See FROMER & SPRIGMAN, *supra*, at 7 (explaining English origins of U.S. copyright law). The Copyright Act of 1790 had the same renewable fourteen-year term of protection for printing and reprinting books. See *id.* at 8 (comparing Statute of Anne with Copyright Act of 1790). While the Copyright Act of 1790 covered a limited range of works, Congress increased the number of creations covered by copyright law throughout the next century. See *id.* at 9 (noting expansion of copyrightable subject matter after 1790). Congress made various artistic outputs, including musical compositions, copyrightable after passing the Copyright Act of 1790. See *id.* (listing expansion of copyrightable materials during nineteenth century). Congress made a major revision to U.S. copyright law with the Copyright Act of 1909, where Congress sought to facilitate artists receiving sufficient compensation for their works while protecting the public interest. See *id.* (expressing major change brought by Copyright Act of 1909); H.R. REP. NO. 60-2222, at 14 (1909) (explaining tensions between promotion of public good and artist compensation in copyright law); *Copyright Timeline, supra* (discussing interests balanced in Copyright Act of 1909). The Copyright Act of 1909 increased the types of copyrightable categories to include all the writings of an author and increased the period of protection for copyrighted materials to a renewable twenty-eight-year term. See Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (amending copyright law); FROMER & SPRIGMAN, *supra*, at 9 (noting changes in copyright law from Copyright Act of 1909).

22. See Marks, *supra* note 21, at 1380-81 (noting major changes made by Copyright Act of 1976). Among the updates, the Act created a statutory right to first publication. See *id.* at 1380 (providing overview of changes in copyright law from Copyright Act of 1976); Robert A. Gorman, *An Overview of the Copyright Act of 1976*, 126 U. PA. L. REV. 856, 865-66 (1978) (discussing right of first publication protected by Copyright Act of 1976). The Copyright Act of 1976 also extended the period of protection for a copyright. See *Copyright Timeline, supra* note 21 (listing updates made by Copyright Act of 1976).

protections, used inclusive categories to describe potentially copyrightable materials, and codified the fair use defense.²³ It lists seven broad categories—a nonexhaustive list of potentially copyrightable material—including musical works and sound recordings.²⁴

While the Copyright Act of 1976 benefits copyright holders by protecting their works, Congress did not enact the Act for this purpose.²⁵ The Copyright Act of 1976 provides creators of works with exclusive rights to reproduce, generate derivative works, and display and perform those works publicly.²⁶ While the Act promotes and rewards creation, providing these rights is a means to an end of achieving the public good of access to creative works.²⁷

Federal courts have indicated that these copyright protections only protect human creators.²⁸ The Copyright Act of 1976 stated that copyright ownership is established originally in the author or authors of the work.²⁹ The Supreme Court

23. See FROMER & SPRIGMAN, *supra* note 21, at 9 (reviewing aims of Copyright Act of 1976); Marks, *supra* note 21, at 1380-81 (providing overview of changes in copyright law from Copyright Act of 1976).

24. See FROMER & SPRIGMAN, *supra* note 21, at 9 (providing overview of Copyright Act of 1976). The other categories of protected subject matter are literary works, dramatic works—including any accompanying music—pantomimes and choreographic works, pictorial, graphic, and sculptural works, and motion pictures and other audiovisual works. See 17 U.S.C. § 107 (setting forth copyrightable subject matter). The broad language of the Copyright Act of 1976 captured the many types of copyrightable subject matter and was broad enough to encompass many of the new technologies created in the years following the Act's passage. See FROMER & SPRIGMAN, *supra* note 21, at 9 (comparing subject matter categories in Copyright Acts of 1909 and 1976).

25. See U.S. CONST. art. I, § 8, cl. 8 (providing Congress with power of granting copyright rights for promoting science and art); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (describing purpose of copyright protections); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (noting goals of U.S. copyright law); *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 526 (2023) (discussing balance Copyright Act of 1976 strikes between public interest and rewarding creation).

26. See 17 U.S.C. § 106 (setting forth exclusive rights in copyrightable work).

27. See, e.g., *Sony Corp. of Am.*, 464 U.S. at 429 (explaining reasoning for providing grant of copyright privileges); *Harper & Row, Publishers*, 471 U.S. at 545-46 (considering objectives of copyright law); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (highlighting ultimate purpose behind U.S. copyright law); see also Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willingness Requirement*, 77 WASH. U. L.Q. 835, 836 n.4 (1999) (acknowledging competing interests in copyright law). For example, in *United States v. Paramount Pictures, Inc.*, the Court stated that the copyright holder's ability to profit off their property is a "secondary consideration." See 334 U.S. 131, 158 (1948) (noting priority of Copyright Act of 1976). According to the Court, U.S. law provides exclusive rights to copyright owners to "[promote] broad public availability of literature, music, and the other arts." See *Twentieth Century Music Corp.*, 422 U.S. at 156 (discussing balance between public interest and copyright holder's interests in Copyright Act of 1976).

28. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (providing rule for authorship under copyright law); *Urantia Found. v. Maaherra*, 114 F.3d 955, 957-59 (9th Cir. 1997) (determining book copyrightable by meeting low threshold standard of creativity); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (setting forth "extremely low" threshold level of "creativity" for copyrightability); *Naruto v. Slater*, No. 15-cv-04324, 2016 U.S. Dist. LEXIS 11041, at *10 (N.D. Cal. Jan. 28, 2016) (explaining authorship requirement for copyright law).

29. See 17 U.S.C. § 201(a) (setting forth copyright's initial ownership). This language is based on the Copyright Clause of the Constitution, which grants Congress the authority to "secur[e] for limited [t]imes to [a]uthors . . . the exclusive [r]ight to their . . . [w]ritings." See U.S. CONST. art. I, § 8, cl. 8. (providing Congress power over intellectual property); U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2:

clarified that under this law, an author is the person who converts an idea into a fixed, tangible expression.³⁰ Lower federal courts have stated that nonhuman-created works are not protected under copyright law.³¹ For example, in *Urantia Foundation v. Maaherra*,³² the Ninth Circuit held that copyright law did not intend to protect works created by “non-human spiritual[s].”³³

While using machines to create works does not alone prevent works from receiving copyright protection, works can only be copyrightable if they contain sufficient human contributions.³⁴ In the late nineteenth century, when the Supreme Court evaluated whether copyright protection could cover a photograph, it reviewed the various creative contributions of the photographer.³⁵ The choices included the pose the photographer instructed the subject to make, the costume, draperies, and accessories in the photograph, and placing the subject to achieve “graceful outlines” to hold the photograph was copyrightable.³⁶ While the owners of works that qualify for copyright protection have several exclusive rights, one major limitation exists: fair use.³⁷

COPYRIGHTABILITY 7 (2025) [hereinafter U.S. COPYRIGHT OFF., COPYRIGHTABILITY] (providing legal framework for requirement of human authorship for copyright protection).

30. See *Cnty. for Creative Non-Violence*, 490 U.S. at 737 (explaining who receives initial copyright ownership); U.S. COPYRIGHT OFF., COPYRIGHTABILITY, *supra* note 29, at 7 (setting forth requirement of human authorship for copyright protection).

31. See *Urantia Foundation*, 114 F.3d at 957-59 (evaluating copyrightability of book); *Naruto*, 2016 U.S. Dist. LEXIS 11041, at *10 (discussing human authorship requirement).

32. 114 F.3d 955 (9th Cir. 1997).

33. See *id.* at 957-59 (evaluating copyrightability of works created by celestial beings). Both parties to the lawsuit believed that spiritual entities delivered teachings that they assembled in the *Urantia* book through the patient of a Chicago psychiatrist. See *id.* at 956-57 (describing creation of *Urantia* Book). The district court ultimately found that copyright law protected the book because humans arranged the *Urantia* teachings. See *id.* at 959 (applying Supreme Court case law). The District Court for the Northern District of California found that *Naruto*, a six-year-old crested macaque who took a series of selfies using a camera, was not an author for purposes of the Copyright Act because *Naruto* was not a human. See *Naruto*, 2016 U.S. Dist. LEXIS 11041, at *1, *10 (evaluating *Naruto*’s copyright infringement claim).

34. See U.S. COPYRIGHT OFF., COPYRIGHTABILITY, *supra* note 29, at 8-9 (reviewing caselaw on nature of human contribution necessary for authorship under copyright law).

35. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (determining copyrightability of Sarony’s photograph). The photograph’s subject was Oscar Wilde, the Irish poet and playwright. See *id.* at 54 (noting photograph’s subject). Sarony sued Burrow-Giles Lithographic Company for copyright infringement for copying and selling Sarony’s photograph of Wilde without permission. See *id.* (setting forth facts of case).

36. See *id.* at 60 (noting creative contributions from photographer); U.S. COPYRIGHT OFF., COPYRIGHTABILITY, *supra* note 29, at 9 (providing example of Court’s analysis of authorship for works created using machines).

37. See 17 U.S.C. § 107 (codifying doctrine of fair use). Additional limitations to copyright holders’ exclusive rights include allowing libraries and archives to create a copy of the work, allowing owners of lawfully-made phonorecords to sell or throw away their copy of the phonorecord, and allowing performances or displays of copyrighted works during classroom instruction. See 17 U.S.C. §§ 108-110 (limiting copyright holders’ rights).

B. Fair Use

Section 107 of the Copyright Act states that fair use of a copyrighted work is not an infringement.³⁸ The statute sets out four factors for courts to consider when determining if a use of copyrighted work is fair use: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market for or value of the copyrighted work.³⁹ Fair use allows courts to avoid strict application of copyright law when doing so would limit the creativity Congress intended copyright law to promote.⁴⁰ Courts review the specifics of each case using these four factors to determine if permitting the use advances the goals of copyright law.⁴¹

The first fair use factor reviews the use of the copyrighted work's character and purpose.⁴² The evaluation of this factor developed into a two-step process, where courts determine if the use is commercial or for a nonprofit purpose, and if the use is transformative.⁴³ If the use is for a commercial purpose and is not transformative, this factor weighs against fair use.⁴⁴ Regarding the

38. See 17 U.S.C. § 107 (explaining distinction between fair use and copyright infringement). Congress included this section of the Copyright Act of 1976 to codify the common-law-developed fair use doctrine. See Marks, *supra* note 21, at 1381 (commenting on Congress's intention when including fair use doctrine in Copyright Act of 1976); FROMER & SPRIGMAN, *supra* note 21, at 389 (noting use of fair use factors in common law pre-1976). Section 107 sets forth examples of potential fair use of copyrighted materials, including use for critique, commentary, news reporting, educational purposes, scholarship, or research. See FROMER & SPRIGMAN, *supra* note 21, at 390 (providing examples of noninfringing fair use of copyrighted works). These materials are examples, not an all-inclusive list of protected activities under fair use. See Gorman, *supra* note 22, at 879 (describing purpose and application of fair use doctrine).

39. See 17 U.S.C. 107 (listing factors courts consider when determining applicability of fair use doctrine). Judge Joseph Story's majority opinion in *Folsom v. Marsh* influenced the fair use factors codified in section 107. See 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (analyzing justifiable uses of copyrighted materials); *Copyright Timeline*, *supra* note 21 (discussing holding in *Folsom v. Marsh* and influence on fair use doctrine); FROMER & SPRIGMAN, *supra* note 21, at 389 (highlighting fair use origins in the United States).

40. See Stewart v. Abend, 495 U.S. 207, 236 (1990) (explaining fair use doctrine).

41. See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577-78 (1994) (highlighting purpose of fair use doctrine and need for case-by-case analysis for fair use review); Leval, *supra* note 13, at 1110-11 (explaining how courts should use fair use factors). While the Supreme Court has emphasized different fair use factors throughout the years, courts evaluate the use of copyrighted work based on each fair use factor to determine if the doctrine protects the use. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (stating importance of fourth fair use factor in comparison with other factors); *Campbell*, 510 U.S. at 578-79 (noting need for review of all fair use factors while emphasizing first fair use factor).

42. See 17 U.S.C. § 107(1) (setting forth first fair use factor). Judge Story's articulation in *Folsom v. Marsh* that courts need to consider "the nature and objects of the selections made" of a use of an original work influenced the first fair use factor. See 9 F. Cas. at 348 (discussing factors for considering legality of use of copyrighted works); *Campbell*, 510 U.S. at 578 (noting history of first fair use factor).

43. See *Campbell*, 510 U.S. at 578-79, 584 (noting first fair use factor requires review of commerciality and transformative nature of new work); Sunray, *supra* note 8, at 24 (explaining key considerations for first fair use factor); U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 3: GENERATIVE AI TRAINING 35 (2025) [hereinafter U.S. COPYRIGHT OFF., GENERATIVE AI TRAINING] (describing first fair use factor).

44. See *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 532-33 (2023) (setting forth first fair use factor).

commerciality question, courts do not ask whether the reason for the use is monetary gain, but whether the user will profit from using the copyrighted material without paying the normal price for the work.⁴⁵

Whether the use of a copyrighted work is transformative depends on whether the new use has an alternative purpose or character.⁴⁶ When an artist creates a work by adding new meaning or aesthetics to the original so that it has a different purpose, the new work has “transformed” the original.⁴⁷ A transformative new use of works promotes the goal of copyright to increase the availability of new works for the public.⁴⁸ If the new work has the same purpose as the original, the new work is more likely to substitute for the original.⁴⁹ This substitution

45. See *Harper & Row, Publishers*, 471 U.S. at 562 (discussing role of commerciality review when analyzing first fair use factor). The commercial nature of the use is not dispositive, and courts need to weigh it against the degree to which the use has a further purpose or different character. See *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 531 (examining commercial element of first fair use factor).

46. See *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 529 (explaining what transformative means for first fair use factor); *Campbell*, 510 U.S. at 579 (defining “transformative” in context of fair use). While courts have adopted the term “transformative” to help explain the first fair use factor, some scholars have argued against using the term. See Shyamkrishna Balganesh & Peter S. Menell, *Going “Beyond” Mere Transformation: Warhol and Reconciliation of the Derivative Work Right and Fair Use*, 47 COLUM. J.L. & ARTS 413, 417-18 (2024) (discussing adoption of term “transformative” and potential ambiguity of term). The issue arose because the Copyright Act of 1976 protects the ability of copyright owners to make derivative works inspired by copyrighted work. See 17 U.S.C. § 106 (listing exclusive rights of copyright owners). The Act defines derivative works as “work[s] based upon one or more preexisting works, such as a translation, musical arrangement, dramatization . . . or any other form in which a work may be recast, *transformed*, or adapted.” See 17 U.S.C. § 101 (emphasis added) (defining “derivative work” for purposes of Copyright Act). Some scholars feared that using the term “transform” to help explain the first fair use factor threatened copyright owners’ ability to exercise their right to create derivative works. See Balganesh & Menell, *supra*, at 417 (explaining scholarly concern over using term “transform” for first fair use factor). The Supreme Court in *Andy Warhol* clarified that the degree to which a use has a different purpose or character than the original determines whether the use is derivative, and thus within the copyright owner’s rights to exploit, or is transformative. See *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 528-29 (analyzing difference between derivative and transformed works under Copyright Act of 1976).

47. See *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 530-31 (providing example of transformative use of copyrighted work); *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994) (describing meaning of transformative for first fair use factor).

48. See Leval, *supra* note 13, at 1111 (explaining meaning of transformative in context of first fair use factor). Uses that critique, provide commentary, or parody a work all transform the copyrighted work. See *id.* (providing examples of transformed work). For example, the Court in *Campbell* stated that parody has transformative value because it benefits society by providing insight on an earlier work, while, at the same time, creating a new work. See *Campbell*, 510 U.S. at 579 (explaining how parody transforms original works).

49. See *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 531 (describing how transformative nature of works affects goals of copyright). For example, in *Andy Warhol*, the Supreme Court’s latest fair use case, photographer Lynn Goldsmith licensed one of her photographs of Prince to Vanity Fair for a one-time use as an artist reference. See *id.* at 515 (providing factual background for case). Vanity Fair hired Andy Warhol to create the piece for their cover. See *id.* (noting how Warhol originally used Goldsmith’s photograph). Warhol created fifteen additional works based on the piece he created for Vanity Fair. See *id.* (highlighting Warhol’s use of Goldsmith’s photograph). The Andy Warhol Foundation (AWF) later licensed one of the fifteen works to Condé Nast for a piece commemorating Prince’s life. See *id.* (describing additional licensing of Warhol’s piece based on Goldsmith’s photograph). Goldsmith notified the AWF that she believed it infringed on her copyright, and the AWF sued her for a declaratory judgment of noninfringement or fair use in the alternative. See *id.* (tracing events causing lawsuit filing). The Supreme Court held that the first fair use factor weighed against fair use

undermines the goal of copyright by diminishing the protected market opportunities for copyrighted works.⁵⁰

The second fair use factor is the nature of the copyrighted work.⁵¹ This factor highlights that certain activities and aspects of works are closer to the core purpose of copyright than others and are less likely to be exploitable under fair use.⁵² For example, the Supreme Court stated that subjective descriptions of public figures in Gerald Ford's autobiography were expressive language—the writing copyright law is designed to encourage—and a person or entity could only copy them if necessary to disseminate factual information.⁵³ The second fair use factor has rarely played a critical role in deciding a fair use dispute.⁵⁴

The third fair use factor considers the amount and substantiality of the portion of the copyrighted work used.⁵⁵ The relevant question for this factor is the extent to which the person or entity used the copyrighted work and the importance of the portion used within the copyrighted work.⁵⁶ A finding of fair use is less likely the greater the portion of the original work the copy uses, or the more important

because both Goldsmith's photograph and Warhol's piece were portraits of Prince used to illustrate pieces about the artist in magazines. See *id.* at 535-38 (explaining Court's reasoning on first fair use factor). The AWF's commercial licensing of the piece was for the same purpose Goldsmith had when licensing her photograph; in other words, the licensing superseded Goldsmith's object. See *id.* at 531, 535-36 (detailing commercial and lack of transformative nature of AWF's use of Goldsmith's photograph).

50. See *id.* at 531-32 (discussing issue of lack of transformation for goals of copyright).

51. See 17 U.S.C. § 107(2) (setting forth second fair use factor). The second fair use factor comes from Judge Story's expression, "the value of the materials taken." See *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (discussing considerations for allowable uses of original works); *Campbell*, 510 U.S. at 586 (noting origins of second fair use factor).

52. See *Campbell*, 510 U.S. at 586 (explaining meaning of second fair use factor); Leval, *supra* note 13, at 1116 (analyzing second fair use factor). For example, the Supreme Court has stated that news reporting, which involves more thoroughness and attention to detail than creativity, is less protected under copyright than expressive works meant to entertain. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 496-97 (1984) (Blackmun, J., dissenting) (analyzing case under second fair use factor).

53. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (applying second fair use factor). A consideration for this fair use factor is whether a work is factual or fictional, with the second factor more likely weighing towards fair use for the former. See *id.* (explaining nature of Ford's autobiography); *Stewart v. Abend*, 495 U.S. 207, 237 (1990) (highlighting considerations for second fair use factor). For example, courts are less likely to allow fair use of a person's manuscript than their grocery lists. See Leval, *supra* note 13, at 1119 (arguing for different treatment for artistic works and private documents in fair use analysis). The manuscript is a creative work likely intended for public consumption, which is a work the Copyright Act intended to encourage. See *id.* at 1117 (reasoning why artistic works and private documents should receive differing treatment in fair use analysis). The Copyright Act did not intend to encourage people to write more grocery lists. See *id.* at 1119 (discussing purpose behind Copyright Act).

54. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) (defining second fair use factor).

55. See 17 U.S.C. § 107(3) (setting forth third fair use factor). Judge Story stated that "quantity and value of the materials used" is a factor in determining whether there was a justifiable use of copyrighted materials. See *Folsom*, 9 F. Cas. at 348 (setting forth factors for determining justified uses of copyrighted materials).

56. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586-87 (1994) (elucidating third fair use factor). For example, in *Harper & Row, Publishers*, the Court held that the third fair use factor weighed against fair use even though *The Nation Magazine* used a small amount of copyrighted work, President Ford's yet-to-be-published memoir, in an unauthorized piece. See 471 U.S. at 564-66 (applying third fair use factor). The portions of the copyrighted material taken were central to the book and from the most intriguing and emotional portions of the entire memoir. See *id.* at 564-65 (noting significance of portion of copyrighted work used).

the copied part is to the original.⁵⁷ What is key is not the amount and importance of the original work used when making a copy, but the amount and importance of what is made accessible to the public that may serve as a replacement for the original.⁵⁸

The fourth fair use factor considers the effect of the use on the potential market for or value of the copyrighted work.⁵⁹ To determine if this factor weighs against fair use, courts consider whether the use of the copyrighted work affects the marketability of the copied work.⁶⁰ A key question is: If the use of the copyrighted work became widespread, would the use substantially affect the potential market for the copyrighted work?⁶¹ A court is supposed to consider

57. See *Authors Guild*, 804 F.3d at 221 (defining third fair use factor). The greater the amount of the original work that an individual or an entity copies, or the more important that part is to the original, the more likely the new work will substitute for the copyrighted work in the marketplace. See *id.* (explaining reasoning behind third fair use factor).

58. See *id.* at 222 (performing third fair use factor analysis for case); *Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc.*, 765 F. Supp. 3d 382, 400 (D. Del. 2025) (analyzing third fair use factor).

59. See 17 U.S.C. § 107(4) (setting forth fourth fair use factor). The fourth fair use factor comes from Judge Story's decision in *Folsom v. Marsh*, which he described as "the degree in which the use may prejudice the sale, or diminish the profits . . . of the original work." See 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (analyzing use of copyrighted letters); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 475 n.27 (1984) (Blackmun, J., dissenting) (tracing origins of fair use doctrine). The importance of this factor, relative to the first fair use factor, has fluctuated throughout the years. Compare *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (stating primary importance of fourth fair use factor), with *Campbell*, 510 U.S. at 579 (emphasizing first fair use factor); Leval, *supra* note 13, at 1111 (advocating for primacy of first fair use factor). For example, the Court in *Harper & Row, Publishers* stated that the fourth fair use factor is the most important of all the fair use factors. See 471 U.S. at 566 (describing importance of fourth fair use factor). In *Campbell*, the Court noted that while a finding that the first fair use factor weighs towards fair use is unnecessary for a finding of fair use, the goals of copyright are advanced by creating transformative works, and that transformative works are at the core of the fair use doctrine's aim of ensuring that copyright law is not unduly restrictive to creative expression. See 510 U.S. at 579 (explaining central nature of first fair use factor). Nevertheless, courts must review all four use factors together to determine whether a use is fair use. See *id.* (discussing process of reviewing use of copyrighted material for fair use); Leval, *supra* note 13, at 1110-11 (noting how four fair use factors work together).

60. See *Harper & Row, Publishers*, 471 U.S. at 566-67 (elucidating fourth fair use factor). In *Harper & Row, Publishers*, an undisclosed source leaked an unpublished copy of President Gerald Ford's memoir to *The Nation Magazine*. See *id.* at 542 (summarizing facts of case). The Nation pulled quotes from the memoir and published a story before *Time Magazine* published its story. See *id.* (discussing *The Nation's* publication of quotes from President Ford's memoir). *Time* had purchased exclusive rights to run prepublication excerpts from the memoir from Harper & Row, the book's copyright holder, and subsequently canceled its agreement with Harper & Row after *The Nation* published their article. See *id.* (explaining cancellation of *Time* deal with Harper & Row). According to the Court, *The Nation's* prepublication risked major damage to the marketability of the memoir because *Time's* cancellation and refusal to pay the agreed to amount for its prepublication was not merely a potential effect, but an actual effect on the market. See *id.* at 567 (explaining effect on market from *The Nation's* actions). Additionally, *The Nation's* prepublication competed for the market for prepublication excerpts by publishing their article with the quoted sections from the memoir without Harper & Row's permission, potentially damaging Harper & Row's ability to sell prepublication excerpts. See *id.* at 568-69 (discussing *The Nation's* effect on potential market for prepublication excerpts). After reviewing the fair use factors, the Court held that *The Nation's* use of the unpublished quotes was not fair use. See *id.* at 569 (setting forth holding of case).

61. See *id.* at 568 (highlighting requirement for fourth fair use factor weighing against fair use); *Campbell*, 510 U.S. at 590 (outlining court's process when reviewing fourth fair use factor).

current markets for the copyrighted work and potential derivative works that the copyright owner is entitled to create in determining the effect of the usage of the copyrighted work.⁶² Ultimately, the fourth fair use factor weighs against fair use if the usage of the copyrighted work substantially affects markets that copyright law gives copyright owners the exclusive right to exploit.⁶³ Once a court has evaluated each fair use factor, it must balance the factors to determine if the new use is fair.⁶⁴ Creators have claimed fair use in the context of the creation of a technological process, including when technology companies have duplicated copyrighted materials to generate new technology.⁶⁵

C. Fair Use in Technology

The Supreme Court and federal appellate courts have considered whether copying copyrighted works to create a technological process is permissible under fair use.⁶⁶ Suno and Udio relied on *Google LLC v. Oracle America, Inc.*⁶⁷ as one of the cases in their argument for fair use.⁶⁸ Oracle owned the copyright to Java SE.⁶⁹ Java SE used the coding language Java.⁷⁰ Google, when creating their

62. See *Harper & Row, Publishers*, 471 U.S. at 568 (noting markets for copyrighted work protected by Copyright Act of 1976). The market for derivative works only includes the markets that the copyright owner would choose to exploit or license to others to create. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (explaining markets for derivative works). For example, a musician is unlikely to create or license a song critical of their work. See *id.* (highlighting what would not count for derivative works).

63. See *Harper & Row, Publishers*, 471 U.S. at 568 (explaining when fourth fair use factor weighs against fair use); Leval, *supra* note 13, at 1124-25 (explaining fourth fair use factor). Judge Leval, in his frequently cited law review piece, noted that situations could occur where a use of copyrighted work does not affect the potential market for the work but is still not covered by fair use. See Leval, *supra* note 13, at 1124 (arguing against predominance of fourth fair use factor for fair use analysis).

64. See *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 527 (2023) (noting judicial review of fair use factors).

65. See *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 6-7 (2021) (setting forth issue of case).

66. See *id.* at 40 (holding Google's copying portions of Oracle's Java SE for their Android platform fair use); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1992) (holding Accolade's copying of Sega's operating system when creating video games fair use).

67. 593 U.S. 1 (2021).

68. See Suno Answer, *supra* note 12, at 5 (highlighting permissibility of intermediate copying of copyrighted works when creating noninfringing outputs); Udio Answer, *supra* note 12, at 5 (discussing applicability of fair use doctrine for copying protected works when creating noninfringing products).

69. See *Google LLC*, 593 U.S. at 6 (introducing factual background for case). Java SE was a platform that developers could use to create programs for computers. See *id.* (explaining uses of Java SE). Java's platform contained implementing code and declaring code. See *id.* at 9-10 (explaining how Java platform worked); Theresa Weisenberger, *Breaking Down the Briefing in Google v. Oracle: Petitioner's Brief*, JD SUPRA (Feb. 28, 2020), <https://www.jdsupra.com/legalnews/breaking-down-the-briefing-in-google-v-83044/> [<https://perma.cc/V6BS-NPPC>] (discussing difference between implementing and declaring code). The implementing code allowed the program to carry out the requested task, while the declaring code helped find the implementing code within the Java system. See Weisenberger, *supra* (noting how implementing and declaring code work).

70. *Google LLC*, 593 U.S. at 8 (highlighting Java's popularity). Sun Microsystems, Oracle's predecessor, created the Java coding language. See *id.* at 7-8 (providing background on Oracle). Six million programmers used Java at the time of the case. See *id.* at 8 (noting widespread adoption of Java coding language).

Android operating system, copied about 11,500 lines of code from the Java SE program.⁷¹ Oracle brought suit against Google, claiming copyright violations.⁷²

The Supreme Court held that Google's copying of Oracle's code was fair use.⁷³ The first fair use factor, the purpose and character of the use, weighed towards fair use because Google used the code to create a new product.⁷⁴ Google only used enough of Oracle's code to create the Android platform, which provides developers with tools to develop new applications within the Android system for public use in smartphones.⁷⁵

D. Intersection of Copyright Law and the Music Industry

The dispute between the record labels and GAI music creation services hinges on copyrighted sound recordings, one of two aspects of music with copyright protection.⁷⁶ Sound recordings are the actual sounds captured in a record, tape, digital file, or other medium.⁷⁷ The artists who create these sound recordings are usually the initial owners of the copyrights in the sound recording.⁷⁸ Typically, artists give record companies ownership of their sound recordings in exchange for an advance and a percentage of sales from sold copies and royalties.⁷⁹ Artists

71. See *id.* at 8-9 (explaining why Google copied Oracle's code). Google had previously negotiated with Sun Microsystems to obtain a license to use the Java platform for its new smartphone technology, but talks broke down due to Sun's interoperability policy. See *id.* at 8 (discussing talks between Google and Sun regarding use of Java platform).

72. See *id.* at 6, 14 (tracing procedural history of case).

73. See *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 7 (2021) (setting forth holding of case).

74. See *id.* at 30-32 (applying first fair use factor).

75. See *id.* at 30 (highlighting transformative nature of Google's use). According to the Court, Google's use of Oracle's code was consistent with the goal of copyright. See *id.* (explaining Google's goals when developing their operating system). Google helped increase the availability of creative expression—in this case, smart-phone applications—by incentivizing their development. See *id.* at 30-31 (discussing how Google's use incentivized developer creation).

76. See 17 U.S.C. § 102 (setting forth copyrightable subject matter); FROMER & SPRIGMAN, *supra* note 21, at 363-64 (describing difference between musical compositions and sound recordings for copyright purposes). Musical compositions, the second aspect of music afforded copyright protection, are the sheet music, or the instructions, for playing a song. See FROMER & SPRIGMAN, *supra* note 21, at 363 (defining musical compositions). Copyright owners of musical compositions and sound recordings have exclusive rights in their copyrighted works, like the right to reproduce their work, prepare derivative works, and distribute copies to the public. See 17 U.S.C. § 106 (setting forth exclusive rights in copyrighted work).

77. See FROMER & SPRIGMAN, *supra* note 21, at 372 (discussing initial ownership of copyrighted sound recordings); Elizabeth Vista, Note, *Taking Bytes: Sound Recordings, Digital Sampling, and the De Minimis Exception*, 67 VILL. L. REV. TOLLE LEGE 29, 30-31 (2022) (explaining types of work protected in music copyright law). The Sound Recording Act of 1971 gave sound recordings federal copyright protection for the first time. See The Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (creating limited copyright in sound recordings); Vista, *supra*, at 33 (discussing history of federal copyright protections for sound recordings).

78. See FROMER & SPRIGMAN, *supra* note 21, at 372 (noting initial ownership of copyrighted sound recordings). If an employee makes a copyrighted sound recording within the scope of their employment, however, their employer takes initial ownership of the recording. See *id.* (explaining initial ownership when employee creates sound recording within scope of employment).

79. See FROMER & SPRIGMAN, *supra* note 21, at 373 (explaining purpose of record labels); Abbott Marie Jones, *Get Ready Cause Here They Come: A Look at Problems on the Horizon for Authorship and Termination*

who have transferred ownership of their sound recordings to record companies use these companies to help commercialize their copyrighted sound recordings by promoting music sales, making their music available on streaming platforms, and licensing their music for use in commercials, televisions, and movies.⁸⁰

Section 106 of the Copyright Act provides owners of sound recordings—in addition to the other exclusive rights of copyright, like the ability to copy and reproduce works and produce derivative works—the exclusive right to perform the copyrighted work publicly through “digital audio transmission.”⁸¹ While

Rights in Sound Recordings, 31 HASTINGS COMM’NS. & ENT. L.J. 127, 139 (2008) (noting industry practice of transferring copyright ownership from artists to record labels); Brett I. Kaplicer, Note, *Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples*, 18 CARDOZO ARTS & ENT. L.J. 227, 235 n.57 (2000) (describing typical arrangements for copyright ownership of sound recordings). The movement of copyrights in sound recordings from artists to record labels has resulted in the concentration of sound recording copyright ownership in the largest record labels. See Joyce Craig-Rient, Note, *Time to Face the Analog Music: How Traditional Radio Broadcasters Infringe Copyrights and What the Music Industry and Congress Can Do to Stop Them*, 72 GEO. WASH. L. REV. 621, 631 (2004) (discussing difference between administering musical composition rights versus sound recording rights). An increasing number of artists have begun using other services that do not take copyright ownership to distribute their music, as opposed to utilizing record labels. See, e.g., *Ownership of Your Music*, DISTROKID, <https://support.distrokid.com/hc/en-us/articles/360013535234-Ownership-of-Your-Music> (last visited July 23, 2025) [<https://perma.cc/G9GR-8PGN>] (describing ownership and intellectual property rights of users of one music distributor); see also U.S. COPYRIGHT OFF., HOW SONGWRITERS, COMPOSERS, AND PERFORMERS GET PAID 9 (2022), <https://www.copyright.gov/music-modernization/educational-materials/musicians-income.pdf> [<https://perma.cc/5W3X-PC8B>] (noting use of music aggregators or distributors by independent sound recording creators).

80. See FROMER & SPRIGMAN, *supra* note 21, at 373 (noting record labels’ services); Rania Anifotos, *Billboard Explains: What Role Do Record Labels Play?*, BILLBOARD (Mar. 31, 2023), <https://www.billboard.com/music/music-news/record-labels-billboard-explains-1235296400/> [<https://perma.cc/BKK2-P3P7>] (highlighting record label services for artists). Record labels also provide marketing and publicity services to artists. See Anifotos, *supra* (explaining how record labels make money on sound recordings).

81. See 17 U.S.C. § 106(6) (providing rights to copyright owners of sound recordings); FROMER & SPRIGMAN, *supra* note 21, at 386 (discussing copyright owner of sound recordings limited right of control over public performances). The Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA) amended Section 106 to add the digital audio transmission right into the exclusive rights available under copyright law. See Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, § 2, 109 Stat. 336 (1995) (adding rights for owners of copyrighted sound recordings under U.S. copyright law); Brian Day, Note, *The Super Brawl: The History and Future of the Sound Recording Performance Right*, 16 MICH. TELECOMM. & TECH. L. REV. 179, 184 (2009) (tracing copyright sound recording owner’s increased rights under copyright law). Congress passed the DPRSRA to require subscription music services, like digital music subscription services, to pay fees to recording companies for using copyrighted sound recordings on their services. See Kimberly L. Craft, *The Webcasting Music Revolution Is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 HASTINGS COMM’NS. & ENT. L.J. 1, 11 (2001) (discussing purpose of DPRSRA). Congress further updated the rights of sound recording owners with the Digital Millennium Copyright Act of 1998. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (amending U.S. copyright law); Day, *supra*, at 185 (noting additional amendments to U.S. copyright law). Interactive streaming transmissions, which the music industry perceived as a greater threat to its market for music sales than noninteractive transmissions, require a digital performance license from the sound recording copyright owner to use the sound recording in a streaming service. See FROMER & SPRIGMAN, *supra* note 21, at 387 (discussing requirements for interactive streaming transmissions using copyrighted sound recordings). These transmissions are services like Spotify, Apple Music, and Google Play, where users can select a sound recording to play or receive a sound recording tailored for them. See 17 U.S.C. § 114(j)(7) (defining interactive streaming

direct copies of the sound recording violate copyright law, sound records that do not directly or indirectly capture the actual sounds in the recording do not infringe on copyright.⁸²

Copyright owners of sound recordings can earn revenue from their copyrights in several ways.⁸³ Based on the protections provided under Section 106, copyrighted sound recording owners can distribute copies of their work and make derivative works.⁸⁴ Sound recording owners can also license the recording for others to use in records, CDs, streaming services, commercials, television and movies, video games, and more.⁸⁵ Copyrighted sound recordings may also prove valuable as training data for GAI models.⁸⁶ For instance, YouTube reportedly

transmissions); FROMER & SPRIGMAN, *supra* note 21, at 387 (explaining interactive streaming transmissions under U.S. copyright law). Noninteractive digital audio transmissions are services like Pandora, where users neither receive a tailor-made program nor can request the service play a particular song. See FROMER & SPRIGMAN, *supra* note 21, at 387 (providing example of noninteractive streaming transmissions). Services like Pandora may obtain a statutory license to broadcast sound recordings if the service complies with various conditions. See 17 U.S.C. § 114(d)(2)(C) (listing requirements for statutory licensing for noninteractive streaming services). There is no right to public performance for sound recordings, so other transmissions, like radio broadcasts, do not need a license to play copyrighted sound recordings. See FROMER & SPRIGMAN, *supra* note 21, at 373 (highlighting limitation in rights for sound recording copyright owners). Nevertheless, the right to public performance for musical compositions requires radio broadcasts to receive a license to play songs. See *id.* at 369 (analyzing public performance right for copyrighted musical compositions).

82. See 17 U.S.C. § 114(b) (providing scope of rights for copyright sound recording owners). Sampling, when parties copy the actual sound from a sound recording for use in a new recording, can infringe on a party's copyright in a sound recording. See FROMER & SPRIGMAN, *supra* note 21, at 373 (discussing legality of sampling under copyright law).

83. See 17 U.S.C. § 106 (setting forth exclusive rights in copyrighted works); U.S. COPYRIGHT OFF., *supra* note 79, at 8 (explaining how performers get paid under U.S. copyright law).

84. See 17 U.S.C. § 106(1)-(2) (listing rights in copyrighted works). Derivative works can include remixes of the sound recording or videos using the recording. See U.S. COPYRIGHT OFF., MUSICAL WORKS, SOUND RECORDINGS & COPYRIGHT (2022), <https://www.copyright.gov/music-modernization/sound-recordings-vs-musical-works.pdf> [<https://perma.cc/D8B4-Z82T>] (describing difference between copyright for musical compositions and sound recordings).

85. See U.S. COPYRIGHT OFF., *supra* note 79, at 8 (listing markets for licensing copyrighted sound recordings).

86. See James O'Donnell, *Training AI Music Models Is About to Get Very Expensive*, MIT TECH. REV. (June 27, 2024), <https://www.technologyreview.com/2024/06/27/1094379/ai-music-suno-udio-lawsuit-record-labels-youtube-licensing/> [<https://perma.cc/KE24-QLNX>] (noting proposed deal offered by YouTube for use of licensed music in AI training); U.S. COPYRIGHT OFF., GENERATIVE AI TRAINING, *supra* note 43, at 66-68 (commenting on relevant market for music industry to license copyrighted works for AI training). There is a strong demand for data to train GAI models because of the need for large amounts of works to successfully train a model. See U.S. COPYRIGHT OFF., GENERATIVE AI TRAINING, *supra* note 43, at 10 (describing training data characteristics developers look for). Outside the music context, OpenAI has reached a licensing agreement with many publishers, including Politico, the Atlantic, and the Wall Street Journal. See Cecily Mauran, *All the Media Companies That Have Licensing Deals with OpenAI (So Far)*, MASHABLE (June 21, 2024), <https://mashable.com/article/all-the-media-companies-that-have-licensing-deals-with-openai-so-far> [<https://perma.cc/HXX2-8TA2>] (listing publishers with licensing deals with OpenAI). While the details of many of these deals are private, some organizations have disclosed that they have provided OpenAI access to their archives to train their models. See *id.* (providing publicly known details on deals between OpenAI and publishers). In a revised summary judgment opinion, Judge Stephanos Bibas, sitting by designation in a U.S. District Court for the District of Delaware case, considered the defendant's use of copyrighted materials and its effect on the potential market of the original work for AI training data when evaluating the fourth fair use factor.

approached Universal Music Group, Sony Music Entertainment, and Warner Records with a deal to provide cash in exchange for the right to use music from dozens of artists to train its AI tool.⁸⁷ A major concern for copyright sound recording owners is that GAI music creation services using copyrighted music without permission to train their models will threaten the market for licensing sound recordings, including the potential market for licensing sound recordings for GAI models' training data.⁸⁸

E. What Is GAI, and What Are GAI Music Creation Services?

GAI is a type of AI that produces new content based on information gleaned from existing content.⁸⁹ GAI has developed from two subcategories of AI.⁹⁰ The first subcategory, machine learning, involves creating models by training algorithms on data sets to allow the model to learn from and make predictions based on that data.⁹¹ One widely used machine learning technique is based on neural networks.⁹² Artificial neural networks model the human brain's structure, which allows the model to analyze more complicated patterns.⁹³ The networks

See Thomson Reuters Enter. Ctr. GmbH v. Ross Intel. Inc., 765 F. Supp. 3d 382 (D. Del. 2025) (analyzing fourth fair use factor).

87. *See* Jess Weatherbed, *YouTube Is Trying to Make AI Music Deals with Major Record Labels*, THE VERGE (June 27, 2024), <https://www.theverge.com/2024/6/27/24187151/youtube-ai-music-deals-licensing-record-labels-sony-umg-warner> [<https://perma.cc/GAZ9-8YLL>] (discussing YouTube's offer for use of copyrighted sound recordings). YouTube did not disclose the amount it offered to the record labels, but its offer was a one-time payment instead of a royalty-based arrangement. *See id.* (highlighting known details of YouTube's offer). YouTube has previously collaborated with nine artists, including Charli xcx, Demi Lovato, and Troye Sivan, to create a GAI tool that could generate songs in the artist's style. *See Perspectives from the Artists Collaborating on Our Early Music Experiments*, YOUTUBE OFFICIAL BLOG (Nov. 16, 2023), <https://blog.youtube/creator-and-artist-stories/youtube-dream-track-ai-artists/> [<https://perma.cc/HGK6-MSB7>] (promoting Dream Track experiment).

88. *See* Mitch Glazier, *Generative AI Reaches Fork in the Road (Guest Column)*, BILLBOARDPRO (June 24, 2024), <https://www.billboard.com/pro/riaa-mitch-glazier-generative-ai-guest-column-suno-udio-lawsuit/> [<https://perma.cc/X49L-PW6N>] (discussing record labels' concerns with GAI music creation services).

89. *See* Dr. Gwendolyn Stripling, *Introduction to Generative AI*, YOUTUBE (May 8, 2023), https://www.youtube.com/watch?v=G2fqAlmoPo&ab_channel=GoogleCloudTech [<https://perma.cc/783W-TBHL>] (providing overview of GAI). Artificial intelligence is a set of technologies that allow computers to do tasks believed to require intelligence when completed by humans. *See* Will Douglas Heaven, *What Is AI?*, MIT TECH. REV. (July 10, 2024), <https://www.technologyreview.com/2024/07/10/1094475/what-is-artificial-intelligence-ai-definitive-guide/> [<https://perma.cc/WY76-YQ8Z>] (explaining meaning of AI). GAI can produce content like text, images, and audio. *See* Stripling, *supra* note 89 (noting types of content GAI can produce).

90. *See* Cole Stryker & Eda Kavlakoglu, *What Is Artificial Intelligence (AI)?*, IBM (Aug. 9, 2024), <https://www.ibm.com/topics/artificial-intelligence> [<https://perma.cc/2PCG-88BB>] (highlighting building blocks for generative AI).

91. *See id.* (providing overview of machine learning); M. Tim Jones, *A Beginner's Guide to Artificial Intelligence and Machine Learning*, IBM (May 20, 2021), <https://developer.ibm.com/articles/cc-beginner-guide-machine-learning-ai-cognitive/#machine-learning> [<https://perma.cc/T4XZ-Y7UY>] (elucidating purpose of machine learning); Stripling, *supra* note 89 (defining machine learning).

92. *See* Stryker & Kavlakoglu, *supra* note 90 (listing types of machine-learning algorithms and highlighting neural networks).

93. *See* Opderbeck, *supra* note 8, at 958 (explaining how machine learning algorithms based on neural networks work); Stripling, *supra* note 89 (detailing how neural networks improve AI processing abilities).

consist of interconnected layers of nodes—operating in the role that a neuron would play in the human brain—which work together to analyze and process data.⁹⁴

The second subcategory, deep learning, consists of multiple layers of neural networks, called deep neural networks, that bring models closer to replicating the decision-making power of the human brain than previous iterations of machine learning.⁹⁵ Deep neural networks consist of input layers—hidden layers that take in information from outside the model and process it—and the output layer, which communicates the result of the model’s processing.⁹⁶ These networks differ from neural networks based on the number of hidden layers; while neural networks have one to two hidden layers, deep neural networks have between three and hundreds.⁹⁷ The multiple layers allow for unsupervised learning, where algorithms pick up on patterns or data groupings from data sets without human assistance to make predictions.⁹⁸

GAI is a deep learning model that uses artificial neural networks and can create content, such as audio, based on user prompts rather than making decisions or predictions based on data.⁹⁹ GAI music creation models use deep neural

Improved understanding of how the human brain functions paved the way for the creation of GAI music creation services. See Sunray, *supra* note 8, at 6-8 (discussing development of machine learning and GAI music creation services). Before the 1950s, scientists learned that brains have a network of electrical pulses that fire to create thought and consciousness. See Jones, *supra* note 91 (examining foundational principles of machine learning). A better understanding of the inner workings of human minds made it conceivable that scientists could model a machine based on the brain’s structure and mimic the human learning process. See *id.* (highlighting relationship between understanding of human mind and AI development). As a result, the 1980s saw machine learning become a leading field of research, aiming to create programs with the ability to learn and build models to make predictions based on specific domains. See *id.* (providing timeline of AI development).

94. See Stryker & Kavlakoglu, *supra* note 90 (describing structure of neural networks); Stripling, *supra* note 89 (explaining composition of neural networks and influence of human brain’s structure on neural networks).

95. See Stryker & Kavlakoglu, *supra* note 90 (providing overview of deep learning).

96. See Operbeck, *supra* note 8, at 958 (illustrating structure of deep neural networks).

97. See Stryker & Kavlakoglu, *supra* note 90 (explaining difference between neural networks and deep neural networks); Stripling, *supra* note 89 (noting number of layers in deep learning models).

98. See Stryker & Kavlakoglu, *supra* note 90 (highlighting benefit of using deep neural networks).

99. See Bernard Marr, *The Difference Between Generative AI and Traditional AI: An Easy Explanation For Anyone*, FORBES (Aug. 23, 2023), <https://www.forbes.com/sites/bernardmarr/2023/07/24/the-difference-between-generative-ai-and-traditional-ai-an-easy-explanation-for-anyone/?sh=57757e97508a>

[<https://perma.cc/D-Y9U-6B9L>] (discussing difference between traditional AI and generative AI); Stripling, *supra* note 89 (illustrating where GAI fits within field of AI). A GAI model works in three phases, starting with the training phase, in which developers create a foundational model by training a deep learning algorithm on large amounts of data. See Stryker & Kavlakoglu, *supra* note 90 (describing phases of generative AI). This step can create a neural network of billions of nodes, each representing different entities, patterns, and relationships in the data. See *id.* (explaining how foundational model created); Operbeck, *supra* note 8, at 958-59; Stripling, *supra* note 89 (describing artificial neural networks). This system learns as developers input more data, and the system adjusts the algorithmic weight of the nodes. See Operbeck, *supra* note 8, at 958-59 (discussing function of machine learning programs). The next step is tuning to prepare the model to complete a specific content generation task. See Stryker & Kavlakoglu, *supra* note 90 (explaining tuning process in generative AI). One approach to tuning is feeding the model data, questions, or prompts the application is likely to see, and creating correspondingly correct answers in the desired format. See *id.* (highlighting different tuning methods). Finally,

networks to generate songs.¹⁰⁰ For example, Suno and Udio used millions of sound recordings to construct their models.¹⁰¹ Their models analyzed the recordings to gain statistical insights and learned patterns of how different musical genres sound and are structured.¹⁰² Users enter text prompts into the Suno and Udio tools, putting in requests like the genre of the song, production elements, lyrics, and subject matter.¹⁰³ The tool's foundational model generates a new song based on the user's prompt and insights the model gained during training.¹⁰⁴

Suno and Udio commercially exploit their models by offering various subscription services.¹⁰⁵ Both companies offer three plan types, two of which are paid subscriptions.¹⁰⁶ Udio's terms of service allow users to use the songs generated from their model "for both personal and commercial purposes," while Suno's paid subscription services provide users the "right, title and interest in and to any Output owned by Suno and generated from Submissions made by [the user] through the Service during the term of [the user's] paid-tier subscription."¹⁰⁷ These policies allow Udio users and Suno's paid users to commercially use the songs generated from their models, like distributing the

the AI developers review their models' outputs and continue tuning. *See id.* (elucidating review step of GAI process).

100. *See* Suno Answer, *supra* note 12, at 3 (noting type of model Suno used); Udio Answer, *supra* note 12, at 4 (describing Udio's model); Stryker & Kavlakoglu, *supra* note 90 (stating GAI creating audio use deep learning models).

101. *See* Suno Answer, *supra* note 12, at 3 (explaining Suno's model); Udio Answer, *supra* note 12, at 4 (discussing Udio's foundational model).

102. *See* Suno Answer, *supra* note 12, at 3 (describing creation of Suno's model); Udio Answer, *supra* note 12, at 4 (providing insights on how Udio's model developed).

103. *See* Wu, *supra* note 7 (using Suno tool for song generation); *Make a Song About Anything*, SUNO, <https://suno.com/> [<https://perma.cc/9UHT-YE93>] (demonstrating Suno's tool); *Make Your Music*, UDIO, <https://www.udio.com/> [<https://perma.cc/Z32D-8WZC>] (displaying Udio's music creation platform).

104. *See* Suno Answer, *supra* note 12, at 2-3 (clarifying how Suno users generate music); Udio Answer, *supra* note 12, at 3-4 (illustrating how people use Udio tool).

105. *See* *How Can We Help?, What Type of Plan Do I Have?*, SUNO, <https://help.suno.com/en/articles/2410049> [<https://perma.cc/VN4J-4R6J>] [hereinafter *What Type of Plan Do I Have?*] (listing Suno's plan types); *Pricing*, UDIO, <https://www.udio.com/pricing> [<https://perma.cc/BJS6-98NY>] (setting forth subscription types for using Udio's service). Both Suno and Udio have raised millions of dollars in funding. *See* Kristin Robinson, *AI Music Firm Suno Raises \$125M in Funding*, BILLBOARD (May 21, 2024), <https://www.billboard.com/business/tech/ai-music-company-suno-raises-new-funding-round-1235688773/> [<https://perma.cc/PP-6H-XY88>] (reporting Suno's fundraising); Charlie Fink, *Udio AI Music Raises \$10 Million, \$6.5 Million For Spines AI, More Sora, Cinematic AI*, FORBES (Apr. 12, 2024), <https://www.forbes.com/sites/chariefink/2024/04/11/udio-ai-music-raises-10-million-65-million-for-spines-ai-more-sora-cinematic-ai/> [<https://perma.cc/MYR8-DNA-T>] (announcing Udio fundraising).

106. *See* *What Type of Plan Do I Have?*, *supra* note 105 (providing Suno's subscription options); *Pricing*, *supra* note 105 (listing Udio's subscription options).

107. *See* *Terms of Service*, UDIO (May 16, 2025), <https://www.udio.com/terms-of-service> [<https://perma.cc/PVD2-94PA>] (authorizing use of Udio's outputs); *Terms of Service*, SUNO (June 30, 2024), <https://suno.com/terms> [<https://perma.cc/MQ6N-VW2G>] (setting forth rights for subscription service users to songs generated using Suno's model).

songs on streaming platforms and licensing the music for advertisements, television, and movies.¹⁰⁸

With platforms like Suno and Udio allowing users to distribute their songs onto streaming platforms, AI-generated songs have started to achieve commercial success.¹⁰⁹ In August of 2024, “Verknallt in einen Talahon,” a song made by feeding lyrics into Udio, reached number forty-eight on the German pop charts and number three on Spotify’s global viral chart.¹¹⁰ “Verknallt in einen Talahon” may be the first AI-generated song to enter the music charts in a leading music market.¹¹¹ The complaint against Suno alleges that some outputs have earned up to two million streams.¹¹² Despite some streaming success, some believe AI-generated music will not replace musicians because AI-generated music tends to have imperfections, like “Taylor Swift’s” lack of audible natural breathing in *The Tortured Poets Department* “leaked” songs.¹¹³

To obtain enough sound recordings to train their models, Suno and Udio used all music files of reasonable quality that were not behind paywalls or password protected on the internet.¹¹⁴ The record labels, which own many of the sound

108. See *How Can We Help?, What Is Commercial or Non-Commercial Use?*, SUNO, <https://help.suno.com/en/articles/2425345> [<https://perma.cc/5E47-9WD8>] (explaining allowable uses of Suno outputs under their terms of service); *Udio – Content FAQs*, UDIO, <https://www.udio.com/faq> [<https://perma.cc/TKY8-BWAL>] (providing overview of allowable uses of Udio outputs). The two companies differ on their policies for requiring attribution, with Udio requiring that users attribute content they generate from the platform and subsequently share to Udio, and Suno having no requirement on attribution. See *How Can We Help?, Can I Distribute My Songs to Spotify, Etc?*, SUNO, <https://help.suno.com/en/articles/2410177> [<https://perma.cc/L6ZM-VC99>] (noting Suno policy on attribution); *Udio – Content FAQs*, *supra* (highlighting exception to using content generated from Udio).

109. See Phillip Oltermann & Deborah Cole, *AI-Generated Parody Song About Immigrants Storms into German Top 50*, GUARDIAN (Aug. 18, 2024), <https://www.theguardian.com/technology/article/2024/aug/18/artificial-intelligence-song-immigrants-germany-top-50> [<https://perma.cc/VN55-83S3>] (discussing commercial reception of AI-generated song).

110. See *id.* (observing AI-generated song’s performance on German charts and Spotify). Listeners have criticized “Verknallt in einen Talahon” because of its use of racial stereotypes and derogatory lyrics towards immigrants. See *id.* (noting controversy over AI-generated song).

111. See *id.* (providing context surrounding “Verknallt in einen Talahon’s” commercial performance).

112. See Suno Compl., *supra* note 10, at 5 (illustrating popularity of songs generated from Suno’s model).

113. See Villarreal, *supra* note 2 (describing tells of GAI music); Wu, *supra* note 7 (explaining distinguishable nature of AI-generated music).

114. See Sunray, *supra* note 8, at 28 (applying third fair use factor to AI music generators); see, e.g., Murray Stassen, *Suno, With A \$500M Valuation, Has Admitted Training Data Its AI on Copyrighted Music. It Just Named Timbaland as a Strategic Advisor*, MUSIC BUS. WORLDWIDE (Oct. 22, 2024), <https://www.musicbusinessworldwide.com/suno-with-a-500m-valuation-has-admitted-training-its-ai-on-copyrighted-music-it-just-named-timbaland-as-a-strategic-advisor/> [<https://perma.cc/QJX2-27FV>] (outlining training data Suno and Udio used). GAI models are known to require millions or billions of works for training. See U.S. COPYRIGHT OFF., GENERATIVE AI TRAINING, *supra* note 43, at 10 (noting data characteristic requirements for GAI model training). Developers still need to use quality outputs to produce a quality GAI model. See *id.* at 11 (explaining need for quality training data for GAI models). For example, while GAI music creation could have trained their models on royalty-free, noncopyrighted music, it is unlikely that these models could produce the same quality outputs as models trained on copyrighted sound recordings. See O’Donnell, *supra* note 86 (explaining implications of training GAI music creation services on royalty-free music). Examples of royalty-free music are songs used in corporate videos and military march music, which are not the same quality

recordings on the internet, control the copyright to many recordings used in Suno and Udio's models.¹¹⁵ The record labels claimed that Suno and Udio's copying of these sound recordings without permission to train their GAI models was copyright infringement.¹¹⁶

F. AI as a Tool in the Creative Process

While artists have used GAI music creation services trained on copyrighted sound recordings to generate songs for commercial purposes, AI tools also have tremendous power to assist artists in the creative process.¹¹⁷ For example, musicians use Suno and other AI tools to help brainstorm ideas for pieces and blend instrumental elements from various songs.¹¹⁸ Comedian King Willonius used Udio to generate a song called "BBL Drizzy" which Metro Boomin, Drake, and other artists subsequently used to create new music.¹¹⁹ The U.S. Copyright Office, in its report on the copyrightability of works generated by AI systems, recognized the power of AI as a tool for creators and a means of enabling people with physical and cognitive disabilities to create.¹²⁰ The report discussed Randy Travis, a Grammy-winning country artist who suffered a stroke that limited his speech functions, who released a song using an AI tool that overlaid a vocal clone of Travis's voice over another singer's vocals.¹²¹ This process allowed

as copyrighted sound recordings owned by major record labels and are not representative of most musical genres. *See id.* (explaining types of royalty-free music).

115. *See* Suno Answer, *supra* note 12, at 8-9 (clarifying ownership of some sound recordings in Suno's model); Udio Answer, *supra* note 12, at 8 (elucidating rights owners of many recordings used in training Udio's model).

116. *See* Suno Compl., *supra* note 10, at 3 (asserting Suno infringed on their copyrighted sound recordings by copying them for training); Udio Compl., *supra* note 10, at 3-4 (claiming Udio's use of copyrighted music for training their model infringed on recording companies' copyrights); U.S. COPYRIGHT OFF., GENERATIVE AI TRAINING, *supra* note 43, at 26-30 (noting potential copyright infringement occurring when GAI systems use copyrighted materials).

117. *See supra* text accompanying notes 109-112 (highlighting emerging commercial success of AI-generated music); Stassen, *supra* note 114 (explaining Suno and Udio used copyrighted material).

118. *See* Wu, *supra* note 7 (providing examples of how artists use generative-AI music creation services); Edward Lee, *AI and the Sound of Music*, 134 YALE L.J.F. 187, 213 (2024) (noting Suno's functionalities).

119. *See* Kristin Robinson, *Metro Boomin's 'BBL Drizzy' Is More Than a Joke—It Could Signal the Future of Sampling*, BILLBOARD (May 15, 2024), <https://www.billboard.com/business/tech/metro-boomin-bbl-drizzy-future-ai-sampling-1235682587/> [<https://perma.cc/D24W-TGSG>] (highlighting Metro Boomin's use of AI-generated beat in "BBL Drizzy"); Udio Answer, *supra* note 12, at 2 (listing ways public and creators used Udio). Metro Boomin encouraged artists to rap over the beat he created using the vocals from "BBL Drizzy," leading to a viral trend. *See* Melanie VanDerveer, *Metro Boomin's 'BBL Drizzy' Contest Takes TikTok By Storm!*, YAHOO (MAY 7, 2024), <https://www.yahoo.com/entertainment/metro-boomin-bbl-drizzy-contest-230552735.html> [<https://perma.cc/4SE4-P9YM>] (reporting on Metro Boomin's contest).

120. *See* U.S. COPYRIGHT OFF., COPYRIGHTABILITY, *supra* note 29, at 24-27, 38 (discussing usage of AI tools for creating and empowering disabled artists).

121. *See id.* at 38 (supporting disabled creators using AI tools); *see also* Ethan Millman, *Randy Travis's New Song Recreates His Voice with AI Technology*, ROLLING STONE (May 3, 2024), <https://www.rollingstone.com/music/music-country/andy-travis-releases-ai-song-1235014871/> [<https://perma.cc/A3UH-YU2D>] (noting Randy Travis's use of AI for new song). Randy Travis released a second single, "Horses in Heaven," using the assistance of vocal AI in January of 2025. *See* Emily Zemler, *Randy Travis Releases His Second AI Song 'Horses in*

Travis to release his first recording in a decade.¹²² The U.S. Copyright Office registered the work because it used AI as a tool, not to generate expression.¹²³ Ultimately, the Copyright Office's report concluded that works that use AI as a tool rather than a replacement for human creativity are still eligible for copyright protection.¹²⁴

III. ANALYSIS

A. GAI Music Creation Services That Copy Copyrighted Sound Recordings and Allow Users to Exploit Commercially Outputs from Their Models Should Not Receive Fair Use Protection

GAI music services like Suno and Udio, which permit commercial use of AI-generated songs from their models, should be unable to use fair use to defend against copyright infringement for using copyrighted sound recordings to train their models.¹²⁵ Suno and Udio required entire copyrighted sound recordings to train their music generation models and obtain the most possible insights into the structure of various types of music.¹²⁶ Assuming that Suno and Udio copied those sound recordings, the GAI music creation services violated Section 106 of the Copyright Act, which provides the owners of copyrighted sound recordings the exclusive right to copy their works.¹²⁷

Heaven,' MSN (Jan. 31, 2025), <https://www.msn.com/en-us/entertainment/news/andy-warhol-releases-his-second-ai-song-horses-in-heaven/ar-AA1ybSrv?ocid=BingNewsVerp> [https://perma.cc/S3RQ-TVY-E] (reporting Randy Travis's new single).

122. See Millman, *supra* note 121 (noting time between Travis's music releases).

123. See U.S. COPYRIGHT OFF., COPYRIGHTABILITY, *supra* note 29, at 38 (explaining Copyright Office's decision to register copyright).

124. See *id.* (announcing conclusion on copyright protections for AI tools).

125. See *supra* text accompanying note 108 (highlighting commercial use of Suno and Udio creations); see, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560-69 (1985) (addressing fair use factors); *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 578-79, 586-87, 590 (1994) (setting forth fair use factors); *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 527-38 (2023) (explaining and applying first fair use factor).

126. See Sunray, *supra* note 8, at 28 (applying third fair use factor to AI music generators); U.S. COPYRIGHT OFF., GENERATIVE AI TRAINING, *supra* note 43, at 55 (describing third fair use factor); Stassen, *supra* note 114 (highlighting Suno's training data). While developers may copy training data additional times as an intermediate step in the machine learning process, some may exist for a short enough time not to constitute a copy for purposes of the copyright statute. See Sobel, *supra* note 14, at 62-63 (analyzing potential copyright infringement issue of intermediate copies created during machine learning). Even if the intermediate copying counts as infringement under the copyright statute, courts may excuse this copying if they consider the initial use fair. See *id.* at 63 (commenting on potential excusable nature of intermediate copying in machine learning). But see Sunray, *supra* note 8, at 7-8 (considering potential copyright infringement of intermediate copies of training data in GAI music services).

127. See *supra* text accompanying notes 81-82 (noting copyright owners' rights); 17 U.S.C. § 106(1) (listing copyright holders' rights).

While copying sound recording owners' works violates Section 106, courts can find fair use when balancing the four fair use factors.¹²⁸ For companies using copyrighted sound recordings to train their models without a license from their owners, the first fair use factor—the copyrighted work's character and purpose—should weigh against fair use because of the companies' commercial and non-transformative use of the recordings.¹²⁹ Companies like Suno and Udio use copyrighted sound recordings for commercial purposes by offering subscription-based services for users to access their models.¹³⁰ Additionally, unlike YouTube, which sought licenses to use copyrighted sound recordings in its GAI models, Suno and Udio did not obtain a license to use copyrighted sound recordings when training their models, which is becoming the normal price for using copyrighted works as training data for GAI models.¹³¹

Regarding the second portion of the first fair use factor, GAI music creation services, such as Suno and Udio, should be unable to successfully argue that their use of copyrighted sound recordings is transformative due to the similarity between the purposes of their outputs and copyrighted sound recordings.¹³² Suno and Udio enable users to utilize songs they generate from their models for commercial purposes.¹³³ Copyrighted sound recording holders also produce and market songs for commercial purposes.¹³⁴ Some may argue that the purpose of training GAI models on copyrighted sound recordings is different because the goal of using copyrighted sound recordings in training data is to analyze how artists structure music; nevertheless, even if the model picks up on subtle details about the structure of music, the ultimate use of GAI music creation services' models has a similar purpose to copyrighted sound recordings—to sell songs.¹³⁵ As such, a court reviewing the first fair use factor should determine that GAI

128. See *supra* text accompanying notes 81-82 (providing copyright owners' exclusive right); 17 U.S.C. § 106(1) (elucidating copyright owners' rights); *supra* text accompanying notes 37-38 (setting forth copyright holders' limitations to exclusive rights under copyright law); 17 U.S.C. § 107 (identifying fair use exception).

129. See *supra* notes 42-43 and accompanying text (explaining court's evaluation of first fair use factor).

130. See *supra* notes 105-108 and accompanying text (noting commercial purpose of some GAI music creation services).

131. See O'Donnell, *supra* note 86 (discussing lawsuits against GAI models and cost of training data for GAI models); *supra* note 87 and accompanying text (describing YouTube's reported potential licensing deal).

132. See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994) (providing definition of "transformative" in context of fair use); Leval, *supra* note 13, at 1111 (analyzing how courts review first fair use factor); Suno Compl., *supra* note 10, at 3 (arguing essentially same purpose of Suno outputs and originals); Udio Compl., *supra* note 10, at 3 (claiming Udio outputs mirror purpose of originals).

133. See *supra* notes 107-108 and accompanying text (showing terms of service allowing commercial use of GAI music creation service outputs).

134. See *supra* note 80 and accompanying text (noting modes of commercial exploitation of copyrighted sound recordings).

135. See *supra* note 107 and accompanying text (describing how GAI music creation models work); *supra* text accompanying notes 133-134 (analyzing uses of copyrighted sound recordings); *supra* note 102 and accompanying text (outlining argument copyrighted training data solely used for analyzing music structure).

music creation services' use of copyrighted sound recordings can substitute for the original work and find that the first fair use factor weighs against fair use.¹³⁶

The second fair use factor, the nature of the copyrighted work, should also weigh against fair use.¹³⁷ Sound recordings are the type of works copyright law ultimately aims to protect due to their expressive nature.¹³⁸ The third fair use factor, the amount and substantiality of the portion used of the copyrighted work, may also weigh against fair use, but the outcome of the analysis on this factor is fact specific.¹³⁹ Companies like Suno and Udio likely required entire sound recordings when training their models to gain insights into the structure of various types of music.¹⁴⁰ Assuming this duplication occurred, copying entire sound recordings—including the most important parts of the original works—makes it more likely that a court would find against fair use for this factor.¹⁴¹ Nevertheless, the amount and substantiality of the original work that the new work makes accessible to the public will ultimately determine the third fair use factor.¹⁴² For example, the third fair use factor would weigh against a GAI music creation service that generates outputs similar to copyrighted sound recordings in its training sets, making the analysis of this factor extremely fact-specific.¹⁴³

The fourth fair use factor, the effect of the use on the potential market for or value of the copyrighted work, should weigh against fair use because the unauthorized use of copyrighted sound recordings for training GAI models substantially affects the potential market for licensing copyrighted sound recordings as training data.¹⁴⁴ While GAI songs have achieved some commercial success, it is unclear whether they are close enough in quality to non-GAI-created songs to substantially affect the markets for copyrighted sound recordings, even if they become widespread.¹⁴⁵ Nevertheless, using copyrighted sound recordings

136. See *Campbell*, 510 U.S. at 579 (explaining when uses of copyrighted works do not transform the original work); Leval, *supra* note 13, at 1111 (interpreting first fair use factor).

137. See *supra* notes 51-52 and accompanying text (discussing application of second fair use factor).

138. See Leval, *supra* note 13, at 1116-17 (explaining types of works weighing in favor of fair use for second fair use factor). Like Gerald Ford's subjective descriptions of public figures, sound recordings are the product of the creator's expression. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563-64 (1985) (analyzing use of Gerald Ford's autobiography under second fair use factor).

139. See *supra* notes 55-57 and accompanying text (describing application of third fair use factor).

140. See Sunray, *supra* note 8, at 28 (applying third fair use factor to AI music generators).

141. See *supra* note 57 and accompanying text (explaining when courts find against fair use for third factor).

142. See *supra* note 58 and accompanying text (describing considerations for third fair use factor).

143. See *supra* note 58 and accompanying text (clarifying key consideration when analyzing third fair use factor).

144. See 17 U.S.C. § 107(4) (listing fourth fair use factor); *supra* text accompanying notes 60-62 (explaining analysis of fourth fair use factor); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566-68 (1985) (analyzing fourth fair use factor); O'Donnell, *supra* note 86 (elucidating market for licensing copyrighted sound recordings).

145. See Oltermann & Cole, *supra* note 109 (discussing commercial success of AI-generated music); Villarroel, *supra* note 2 (explaining how to spot AI-generated music); Wu, *supra* note 7 (questioning potential of AI-generated music to replace human-made music). But see U.S. COPYRIGHT OFF., GENERATIVE AI TRAINING, *supra* note 43, at 65 (considering potential market dilution for copyrighted works when GAI outputs compete in market).

as training data for GAI models substantially affects the potential market for licensing these recordings for training data.¹⁴⁶ While this area of the market is still emerging, YouTube's lump-sum offer to major record labels in exchange for using a few artists' music to develop an AI tool underscores the inherent value of copyrighted sound recordings as training data.¹⁴⁷ If companies like Suno and Udio can use copyrighted sound recordings to train their models without paying their owners, there would be no incentive for others—like YouTube—to pay licenses to use those recordings as GAI training data.¹⁴⁸ This practice would leave no market for licensing copyrighted sound recordings for use in training AI models.¹⁴⁹ Because the widespread use of copyrighted sound recordings in GAI models would ultimately affect the market for licensing these recordings to use as training data, the fourth fair use factor should therefore weigh against fair use.¹⁵⁰ With the first, second, and fourth factors—and potentially the third, depending on the facts—weighing against fair use, a court should find that fair use does not protect a GAI music creation service's unauthorized use of copyrighted sound recordings to train their model.¹⁵¹

B. GAI Music Creation Services Should Either Change How They Obtain Inputs for Their Models or Change Their Terms of Service to Potentially Comply with Copyright Law

While GAI music creation services should not be able to rely on fair use when using copyrighted sound recordings to train their models, the services could change how they obtain inputs for their models or change their terms of service to better comply with copyright law.¹⁵² First, the services could pay to license copyrighted sound recordings from record labels and other copyrighted sound

146. See Suno Answer, *supra* note 12, at 8 (acknowledging use of record companies' copyrighted sound recordings); Udio Answer, *supra* note 12, at 8 (admitting to using record companies' copyrighted sound recordings); *supra* note 61 and accompanying text (explaining key question for fourth fair use factor); O'Donnell, *supra* note 86 (describing lucrative market).

147. See O'Donnell, *supra* note 86 (discussing YouTube's proposed deal with recording companies).

148. See Suno Answer, *supra* note 12, at 8 (noting source of their training materials); Udio Answer, *supra* note 12, at 8 (clarifying where data for training Udio's model came from); O'Donnell, *supra* note 86 (comparing YouTube, Suno, and Udio's approaches to obtaining training data for their models). Deals with copyright sound holders, like the one YouTube pursued, may be prohibitively expensive for AI music company startups. See O'Donnell, *supra* note 86 (elucidating challenges for AI music companies if Suno and Udio lose their cases); U.S. COPYRIGHT OFF., GENERATIVE AI TRAINING, *supra* note 43, at 69 (noting dispute over feasibility of voluntary licensing of copyrighted works for training GAI models).

149. See *Harper & Row, Publishers*, 471 U.S. at 568 (noting markets for copyrighted work protected by Copyright Act of 1976).

150. See *id.* (explaining how effect on potential markets contributes to fair use analysis).

151. See *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 527 (2023) (noting judicial review of fair use factors).

152. See O'Donnell, *supra* note 86 (explaining alternative sources of training data for GAI music creation services); Weatherbed, *supra* note 87 (reporting YouTube's attempted licensing deal with copyrighted sound recording owners); *Perspectives from the Artists Collaborating on Our Early Music Experiments*, *supra* note 87 (promoting GAI music creation service using nine artists' works).

recording owners to train their models.¹⁵³ Obtaining entire catalogs of copyrighted music from record labels would likely be cost-prohibitive for many, so GAI music creation service start-ups could pay licenses to use a limited number of artists' songs to train their models.¹⁵⁴ Nevertheless, using a small sample size of copyrighted songs in a training set would be impractical because it would severely limit the model's quality, as a substantially larger set is required to learn how musical genres sound and how artists structure songs within certain genres.¹⁵⁵ Using royalty-free music found online would likely run into the same issue because songs in the public domain—like songs used in corporate videos or military march music—would likely not provide enough information or a representative sample of genres of music for models to create outputs as effectively as songs generated from models trained on copyrighted sound recordings.¹⁵⁶

Alternatively, GAI music creation services could use a carve-out in U.S. copyright law to obtain sound recordings to train their models and avoid violating copyright law.¹⁵⁷ Sound recordings that do not directly or indirectly capture the actual sounds of a copyrighted sound recording do not infringe on copyright.¹⁵⁸ Based on this carve-out, GAI music creation services could obtain licenses for covers of copyrighted sound recordings that do not use the sounds from the original recordings.¹⁵⁹ This approach would be less expensive than licensing with the record labels; nevertheless, it would be logistically challenging for the services to obtain enough sound recordings to build a model capable of producing quality outputs.¹⁶⁰

Finally, the GAI music creation services could continue to use copyrighted sound recordings to train their models, but update their terms of service to limit their models' use as tools in the creative process.¹⁶¹ This approach would require services to prohibit users from selling the songs they generate from their platforms, distributing songs to streaming services, and licensing songs for use in television, film, and advertisements.¹⁶²

153. See Weatherbed, *supra* note 87 (detailing YouTube's attempted deal with record labels).

154. See O'Donnell, *supra* note 86 (describing expense of licensing copyrighted sound recordings).

155. See *supra* note 100 (explaining how GAI music creation models work).

156. See O'Donnell, *supra* note 86 (describing likely ineffectiveness of using royalty-free music when training GAI music creation models).

157. See *supra* note 82 and accompanying text (noting limitation on protection for copyrighted sound recording owners).

158. See 17 U.S.C. § 114(b) (setting forth scope of exclusive rights in sound recordings).

159. See *id.* (listing limitation on exclusive right of owner of copyright in sound recordings).

160. See *supra* notes 100 (explaining how GAI music creation models work); O'Donnell, *supra* note 86 (highlighting extreme cost of licensing).

161. See *supra* Section II.F (describing use of GAI music creation services in music production).

162. See *supra* text accompanying notes 105-108 (discussing commercial exploitation currently allowed for outputs from Suno and Udio).

Copying copyrighted sound recordings for use as a tool in the creation process presents a stronger fair use argument.¹⁶³ The second factor would still weigh against fair use; the original pieces are expressive works that copyright law sets out to protect.¹⁶⁴ The third fair use factor may weigh in favor of fair use because while the services would still copy entire sound recordings—including the most important portions of the copyrighted works—the determination would still ultimately depend on the amount of the original work made accessible as an output from the GAI music creation service.¹⁶⁵ If GAI music creation services could prevent users from selling, distributing, and licensing outputs from their models and only allow users to use the outputs to generate new music, these outputs would not substitute for the original works, and the third factor would weigh in favor of fair use.¹⁶⁶ Additionally, the fourth fair use factor should still weigh against fair use because using copyrighted sound recordings without a license to train GAI models, regardless of their use, substantially affects the potential market for copyrighted sound recordings as training data.¹⁶⁷

While two of the fair use factors should weigh against fair use, GAI music creation services that limit themselves to use as tools in artists' creative process should have the first fair use factor—the character and purpose of the use of the copyrighted work—weigh in favor of fair use due to the transformative nature of the use.¹⁶⁸ In this scenario, the purpose of using copyrighted sound recordings is to create a tool artists can use to develop new creative expression.¹⁶⁹ This purpose differs from the purpose behind copyrighting sound recordings, which is to sell, distribute, and license songs.¹⁷⁰ Even if GAI music creation services limit access to this service to paying users—making the use of the copyrighted sound recordings commercial—the transformative nature of the use makes the commerciality less significant and should allow this factor to weigh in favor of fair use.¹⁷¹

163. See 17 U.S.C. § 107 (setting forth fair use factors); *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 586-87 (1994) (explaining second and third fair use factor); *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 40 (2021) (providing holding for fourth fair use factor).

164. See *supra* notes 51-52 and accompanying text (describing second fair use factor).

165. See *Authors Guild v. Google Inc.*, 804 F.3d 202, 221-22 (2d. Cir. 2015) (explaining third fair use factor); *supra* note 126 (arguing likelihood that Suno and Udio copied entire copyrighted sound recordings).

166. See *Authors Guild*, 804 F.3d at 222 (applying third fair use factor to case).

167. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566-67 (1985) (explaining fourth fair use factor); *supra* notes 86-87 and accompanying text (detailing potential market for copyrighted sound recordings as training data).

168. See *supra* note 42 and accompanying text (listing and discussing history of first fair use factor); *supra* notes 43, 47-48 and accompanying text (noting and explaining “transformative” for fair use purposes).

169. See *supra* 118-119 and accompanying text (highlighting use of GAI music creation services).

170. See *FROMER & SPRIGMAN*, *supra* note 21, at 373 (discussing record labels' services); Anifitos, *supra* note 80 (describing purpose of record labels).

171. See *Harper & Row, Publishers*, 471 U.S. at 562 (distinguishing between commercial and noncommercial uses for first fair use factor); *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 531 (2023) (explaining relationship between commercial use and transformative use for first fair use factor).

The use of copyrighted sound recordings as tools in the creation process is analogous to Google's copying of code from the Java SE program in *Google LLC v. Oracle America, Inc.*, which the Supreme Court held weighed for fair use for the first factor.¹⁷² There, Google copied Oracle's code to create the Android platform, providing developers with a platform for developing new applications.¹⁷³ Similarly, using copyrighted sound recordings to create a GAI music creation model can provide outputs to use as inspiration for new songs.¹⁷⁴ The similarities between the two uses should allow courts to find that the first fair use factor weighs in favor of fair use.¹⁷⁵ While this use of copyrighted sound recordings should have two out of four fair use factors weigh against fair use, this weighing is still a stronger argument for fair use than GAI music creation services' current use of copyrighted sound recordings.¹⁷⁶

C. Fair Use's Potential Lack of Protection for Use of GAI Music Creation Services as a Creative Tool Goes Against the Spirit of Copyright

While protecting unlicensed copyrighted sound recordings from use as GAI training data is aligned with the goals of copyright, the result of the fair use analysis for GAI music creation services used solely for creative purposes is potentially overprotective of copyrighted sound recordings based on these goals.¹⁷⁷ Allowing users of GAI music creation services trained on copyrighted sound recordings to place the outputs of these services on streaming platforms, sell the outputs, or license the outputs for other media does not advance U.S. copyright law's goal of increasing the public's access to creative works because these outputs do not have sufficient human creative contributions under copyright law.¹⁷⁸ Users type their ideas for a song into these models that generate songs, which is insufficient human creative involvement to afford copyright

172. See *supra* notes 73-75 and accompanying text (explaining Court's holding for first fair use factor in *Google LLC v. Oracle America, Inc.*).

173. See *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 30 (2021) (explaining transformative nature of Google's copying).

174. See *supra* notes 118-119 and accompanying text (discussing use of GAI music creation services for creative purposes).

175. See *supra* note 42 and accompanying text (listing and discussing history of first fair use factor); *supra* notes 43, 47-48 and accompanying text (noting and explaining "transformative" for fair use purposes).

176. See *Google LLC*, 593 U.S. at 19 (discussing balancing of fair use factors).

177. See *supra* Section II.A (discussing history and purpose of U.S. copyright law); *supra* text accompanying note 1176 (setting forth potential fair use analyses by courts).

178. See *supra* notes 107-108 and accompanying text (noting Suno and Udio users' ability to commercially exploit outputs); *supra* notes 34-36 and accompanying text (describing requirement of human creative contribution for copyright protection); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (explaining purpose of U.S. copyright law); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545-46 (1985) (highlighting aims of copyright); *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 526 (2023) (describing Copyright Act's balance of competing claims).

protections.¹⁷⁹ Unlike the photographer in *Burrow-Giles Lithographic Co. v. Sarony*, who made creative choices by posing and arranging his subject to capture a desired expression, a GAI music creation service user minimally contributes to the final output by inputting text into the system.¹⁸⁰ Because these outputs are not the types of works that copyright law intended to promote, the goals of U.S. copyright will not be impeded should a court find that the fair use analysis does not protect these services from copyright infringement for using copyrighted sound recordings.¹⁸¹

By contrast, the goals of U.S. copyright would not be furthered should the courts' fair use analysis not protect the use of copyrighted sound recordings in GAI music creation services limited to use as tools for artists.¹⁸² Allowing the use of GAI music creation services as tools in the production process for artists advances the goals of U.S. copyright law because it increases the public good of access to creative works.¹⁸³ GAI music creation service outputs are useful tools for the inspiration and creation of new music.¹⁸⁴ For example, the widespread use of Udio output "BBL Drizzy" in beats and songs by content creators in 2024 demonstrates the usefulness of outputs generated from GAI music creation services in the creative process.¹⁸⁵ Using outputs from these models to brainstorm or as a starting point for producing new songs has encouraged individuals to create, which advances the public good through the talents of creators in the arts as intended by the Copyright Clause and U.S. copyright law.¹⁸⁶

IV. CONCLUSION

GAI music creation services trained on copyrighted sound recordings demonstrate the challenge in balancing copyright holders' interests and incentivizing the creation of new works. Using copyrighted sound recordings without a license to train GAI models threatens the value of those songs by generating outputs with the same purpose as the original recordings and

179. See *supra* note 103 and accompanying text (detailing how users can generate songs on Udio or Suno); *supra* note 34 and accompanying text (explaining amount of human contribution needed for copyright protection).

180. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (analyzing copyrightability of photograph); *supra* notes 103-104 and accompanying text (chronicling how GAI music creation services generate music).

181. See *supra* note 27 and accompanying text (setting forth goal of copyright law).

182. See *supra* Section II.A (discussing history and purpose of U.S. copyright law); *supra* accompanying text note 163 (opining fair use for GAI tool purpose).

183. See *Sony Corp. of Am.*, 464 U.S. at 429 (explaining purpose of U.S. copyright law); *Harper & Row, Publishers*, 471 U.S. at 546 (highlighting aims of copyright); *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 526 (describing Copyright Act's balance of competing claims).

184. See *supra* Section II.F (noting usefulness of AI tools in music creation process).

185. See *supra* note 119 and accompanying text (detailing "BBL Drizzy" trend).

186. See *supra* note 21 and accompanying text (providing Court's interpretation of Copyright Clause); *supra* text accompanying note 27 (describing how Copyright Act promotes goal of Copyright Clause).

potentially eliminating the emerging market for recordings as training data for AI models. At the same time, preventing GAI music creation services from training their models on copyrighted sound recordings may limit the public's access to creative goods. Without the outputs from GAI music creation services, artists would lose a potential source of inspiration for new songs. While services have alternatives to copyrighted sound recordings for training, each comes with either a financial cost or a possible loss in quality of outputs. Despite the drawbacks, GAI music creation services should consider licensing a limited number of copyrighted sound recordings or covers of those recordings to train their models. This approach will allow artists to receive compensation for their contributions to GAI music creation services, while providing the services with training data to serve as a foundation for their models.

GAI music creation services may choose to limit the use of their models as tools for artists in the creation process to conform potentially with U.S. copyright law. Still, it is questionable whether using copyrighted sound recordings to train models for this purpose is fair use under U.S. copyright law, notwithstanding the increase in creation that outputs from GAI music creation services encourage. The potential inability to protect this use highlights the need to update U.S. copyright law to encourage GAI services designed for use as tools for artists. This update would advance the ultimate goal of U.S. copyright law: to increase the public good of access to creative works.