

AI Artists Highlight Need For Copyright Updates

By **Sarkis Yeretsian and Jonathan Goins** (September 27, 2022)

Like it or not, the age of artificial intelligence — and more broadly, the Fourth Industrial Revolution[1] — is here, and it is here to stay.

The Fourth Industrial Revolution's emergence of a wide variety of technologies, including AI, genome editing, robotics, 3-D printing and more recently, cryptocurrency and the metaverse, are creating havoc for attorneys as they attempt to decipher the myriad of legal issues involving the creation, exchange and distribution of digital inventions.

This next-gen phenomenon is already blurring the virtual versus real-world reality, or what we formerly thought of the latter — creating unique and new opportunities for additional social media-driven content, and potential resulting revenue streams.

For quite some time, corporations and startup entrepreneurs have been attempting to utilize and adopt AI-related properties into every aspect of our daily lives — from daily household items to computers, gaming, mobile devices, film and music.

Without question, AI is developing at a faster pace than the law, and it will continue to be difficult in deciphering ownership, let alone enforcement, of any intellectual property rights.

The U.S. Supreme Court's *Alice Corp. v. CLS Bank International* decision in 2014 has made the process more stringent in obtaining patent protection involving software technology and AI-related inventions.[2] Greater attention, as a result, has been given to the law of copyright.

To this end, this commentary aims to explore the recent trends in AI-related virtual art and its intersectionality with copyright law.

Recently, virtual artists like Hatsune Miku and, more notoriously, FN Meka — a robot rapper signed by Capitol Records and promptly dropped last month when faced with backlash over the use of racial slurs in its debut single[3] — have been touted as AI musicians changing the virtual landscape.

Hatsune Miku is a Vocaloid synthesizing software voicebank that appears as a 16-year-old pop star with long, blue pigtails.

It was created by Crypton Future Media Inc., which took vocal samples of Japanese voice actress Saki Fujita at controlled pitch and tone, then incorporated her voice and design into a commercially available product for everyday consumers to use. Since its release, Hatsune Miku has performed at several concerts, both virtual and live.

FN Meka, another virtual artist, was created by Factory New, a media company focused on virtual and digital talent. AI-generated FN Meka became a sensational and polarizing phenom — gaining over 10 million followers and generating over a billion views on TikTok. Similar to Hatsune Miku, FN Meka was voiced by a real human.



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When asked about the basics of the AI process and creating an FN Meka single, Anthony Martini, co-founder of Factory New, told The Guardian that, currently, the AI technology analyzes certain popular songs of a specified genre and generates recommendations for the new song's construction.[4] Such recommendations and generated product include the chords, melody, tempo, sounds, lyrics and more.[5]

So how does one procure any IP rights to these virtual artists? Traditionally, under Section 106 of the Copyright Act, creative artists and musicians are protected by basic copyright principles, in copyrighting the musical composition and underlying sound recording.

As far back as 1990, for example, the Copyright Act granted new protection for moral rights of visual artists in physical artwork, even if the artist did not own the building of said artwork.

More specifically, the U.S. Court of Appeals for the Second Circuit further reinforced this right in 2020 under copyright law's Visual Artists Rights Act, or VARA, by affirming a \$6.75 million order in *Castillo v. G&M Realty LP* requiring a realtor to pay a group of graffiti artists after it whitewashed and painted over their works in Long Island.[6]

However, does VARA protect or extend to virtual art, digital art or AI-created art such as virtual music? Unfortunately, VARA is limited only to artwork publicly deemed as a recognized stature, and even then, it protects only the prevention of any physical destruction.[7]

As such, a song auto-generated by AI technology may not be entitled to the same copyright protection. But we believe Congress or the U.S. Copyright Office will be forced to create greater clarity at some point.

For quite some time, a number of individuals have actively petitioned the Copyright Office to afford copyright protection to original works created by AI.

Even as recently as this year, on Feb. 14, the Copyright Office heard a matter regarding a two-dimensional artwork created by AI titled "A Recent Entrance to Paradise" and **denied it protection**. The Copyright Office argued that the copyright laws in place protect only "the fruits of intellectual labor" that "are founded in the creative powers of the [human] mind." [8]

Therefore, in order to register works produced by a machine, the work must be the product of human authorship.[9] As stated earlier, FN Meka is a virtual artist, created by Factory New and voiced by an actual human.

Further, the Copyright Office considered a report from the National Commission on New Technological Uses of Copyrighted Works, or CONTU, as a guidepost.

The CONTU report, in part, aimed to study the creation of works by "automatic systems of machine reproduction." [10] The report goes on to explain: The eligibility of any work for protection by copyright depends not upon the device or devices used in its creation, but rather upon the presence of at least minimal human creative effort at the time the work is produced.

Despite the necessity of the human creative effort, others argue that some courts have been put into situations of nonhuman authorship, which have left the question somewhat

open-ended.

Looking to Ryan Abbott's "The Revolution Has Arrived: AI Authorship and Copyright Law," this professor of law and health sciences at the University of Surrey School of Law argues that that courts had previously addressed the issue of nonhuman authorship.

In the 1997 *Urantia v. Maaherra* case, the U.S. Court of Appeals for the Ninth Circuit was asked whether a book dictated by a spiritual being was copyrightable. The court reasoned that the author did not have to be human, but the creation, organization and compilation of the texts, were, at least partially, the product of human creativity.[11]

He goes on to refer to the famous 2018 Ninth Circuit monkey selfie case, *Naruto v. Slater*, in which a photographer set up a camera for the animals to use. It was used by a monkey to take a selfie, the photographer claimed the copyright and PETA attempted to assert a copyright on the monkey's behalf.

The matter was ultimately thrown out for standing but left open-ended the decision of authorship.[12] But the Copyright Office refuted this argument and countered that: The term "authorship" implies that, for a work to be copyrightable, it must owe its origin to a human being. Materials produced solely by nature, plants, or animals are not copyrightable.[13]

The Copyright Office continues to focus on the concept of creative powers and the fruits of intellectual labor, but chooses to limit that ability only to humanity — even though it is the very humanity creating the AI, arguably.

While the intent of this article is not to persuade the Copyright Office to provide comprehensive legal protection to AI, or to totally depart from years of jurisprudence, a reevaluation of the limitations of protections is necessary in a world that is continuously blurring the lines between human and AI.

As described above, the AI technology in question ultimately observed and analyzed examples of popular music and generated something truly unique.

There is complicated coding and deeper learning that goes into making a unique song, and the full power, and consequences, of using AI are yet to be fully understood.[14] Only time will tell whether we see more developments in copyright protection in AI technology.

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[1] Klaus Schwab, *The Fourth Industrial Revolution* (New York: Crown Publishing Group (2017)).

[2] *Alice Corporation Pty. Ltd. v. CLS Bank International, et al.*, 573 U.S. 208 (2014). To those AI proponents, judges in Australia and South Africa recently provided patent

protection to AI-created inventions.

[3] <https://www.nytimes.com/2022/08/23/arts/music/fn-meka-dropped-capitol-records.html>.

[4] <https://www.theguardian.com/music/2022/aug/24/major-record-label-drops-offensive-ai-rapper-after-outcry-over-racial-stereotyping>; <https://www.musicbusinessworldwide.com/this-robot-rapper-has-9-million-followers-on-tiktok-his-creator-thinks-traditional-ar-is-inefficient-and-unreliable/>.

[5] *Id.*

[6] *Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020).

[7] 17 U.S.C. § 106A(a)(3)(B).

[8] See Compendium Of U.S. Copyright Office Practices Sec. 306 Quoting (Quoting Trade-Mark Cases, 100 U.S. 82, 94 (1879)) (3d Ed. 2021).

[9] *Id.*

[10] See National Commission on New Technological Uses of Copyrighted Works, Pub. L. 93-573, § 201(b)(2), 88 Stat. 1873, 1873 (1974).

[11] *Urantia Found v. Kristen Maaherra*, 114 F.3d 955, 958 (9th Cir. 1997).

[12] *Naturo v. Slater*, 888 F.3d 418 (9th Cir. 2018).

[13] U.S. Copyright Office, Compendium Of U.S. Copyright Office Practices § 202.02(b) (2d ed. 1984).

[14] Not only can AI create music, but AI Scientist Marcus Hutter recently co-authored a paper for Australian National University claiming he believes AI also has the possibility of eliminating humanity. <https://www.vice.com/en/article/93aqep/google-deepmind-researcher-co-authors-paper-saying-ai-will-eliminate-humanity>; <https://onlinelibrary.wiley.com/doi/10.1002/aaai.12064>.