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Legal Landscape Related to AI-Generated Works Remains Uncertain

Lisa T. Oratz and D. Sean West*

Abstract: *From artificial intelligence (AI) tools that can generate highly sophisticated art, music, and conversation to technology capable of recreating Elvis on the big screen, a recent explosion and maturing of generative AI technologies is disrupting all forms of content. But while AI tools are becoming ubiquitous and creating new and innovative ways to create and monetize content, unanswered legal questions leave the legal landscape uncertain. This article discusses recent developments regarding the copyrightability of AI-generated works.*

Background

How Does Generative AI Work?

Generative AI refers to a class of artificial intelligence algorithms that are designed to generate new, original content, such as images, music, or text, based on a given set of input data. There are various approaches to building generative AI models, but one of the most common methods is to use neural networks, which are a type of machine-learning algorithm inspired by the structure and function of the human brain.

In a typical generative neural network, the model is trained on a large data set of examples, such as images or text. The network learns to recognize patterns and relationships within the data and uses this knowledge to generate new content. For example, a generative text model might be trained on a large corpus of news articles and then used to generate new articles. Similarly, a generative image model might be trained on a data set of photos and then used to

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generate new images. Overall, generative AI has the potential to be a powerful tool for creating new and innovative content in a wide range of fields, including art, design, and entertainment.

User input plays a role in shaping the output of AI tools, with different tools allowing for different kinds of user input. Common inputs accepted by AI tools include text prompts (e.g., a question to be answered or a description of what the user wishes the tool to generate) and uploaded content (e.g., a reference image uploaded by the user that the tool is to use in creating the generated content). These inputs provide instructions that guide the AI tool. For example, the above description of generative AI was generated through ChatGPT using the text prompt "How does generative AI work?"

Human Authorship Requirement

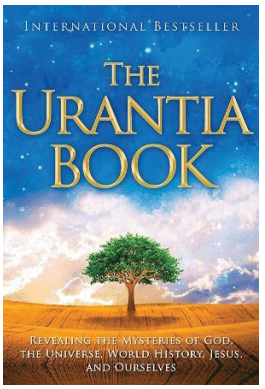
The human authorship requirement in U.S. copyright law refers to the principle that a work must be created by a human being to be eligible for copyright protection. Although there is no express requirement of human authorship in the Copyright Act, the basis for the human authorship requirement is found in the U.S. Constitution. Section 1, Article 8, which is the basis for copyright protection, refers to "securing for limited times to *authors and inventors* the exclusive right to their respective writings and discoveries" (emphasis added). From this, courts and the U.S. Copyright Office have consistently required some element of human authorship when determining questions of copyrightability. However, they have provided little meaningful guidance on what degree of human involvement is required in the creation of a work for the work to be protectable.

Case Law

There have been few cases addressing the human authorship requirement. The following cases have emerged as the most frequently cited by courts and the Copyright Office in interpreting the human authorship requirement:

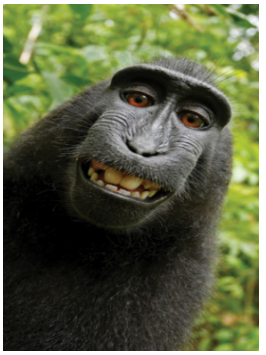
- *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). This U.S. Supreme Court case addressed the issue of human authorship in the context of the novel assisting technology of the day—photography. The case involved a photograph of Oscar Wilde. Burrow-Giles, who had distributed prints of the photograph, argued that photography was merely a mechanical process and that the photographer, Napoleon Sarony, was therefore not an "author" (and the photograph was therefore not protected by copyright). Although the court recognized that to be protectable, a work needs to represent the "original intellectual conceptions of the author," it found that the photograph was the work of human authorship.[1] The Court emphasized that the photographer's creative choices, such as posing the subject, arranging the scene and costumes, selecting the lighting, and suggesting and evoking the desired expressions, demonstrated the necessary originality to qualify for copyright protection.

- *Urantia Foundation v. Kristen Maaherra*, 114 F.3d 955 (9th Cir. 1997). This Ninth Circuit case addressed the issue of human authorship in the context of a work purportedly authored by celestial beings. Although the Ninth Circuit started its discussion in *Urantia Foundation* with the observation that "copyright laws, of course, do not expressly require 'human' authorship," it ultimately held that "some element of human creativity must have occurred" for the work to be copyrightable.[2] Although the work was claimed to be a transcription of answers from celestial beings to questions that were posed by the transcribers, sufficient human



authorship was found in the selection and formation of the specific questions asked. "These questions materially contributed to the structure of the [works], to the arrangement of the revelations in each [work], and to the organization and order in which the [works] followed one another."[3]

- *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018). This Ninth Circuit case addressed the issue of human authorship in the context of a selfie allegedly taken by a crested macaque monkey named Naruto using a camera that had been set up by a British photographer named David Slater. In ruling against there being any copyright protection in the selfie, the court emphasized that the Copyright Act of 1976 only protects the works of human authors and that there was no indication that Congress intended to extend copyright protection to animals.



The reasoning of these cases also aligns with statements about human authorship in the 1978 report produced by the National Commission on New Technological Uses of Copyrighted Works (CONTU). In that report, CONTU observed that "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."[4]

Compendium of U.S. Copyright Practices

The main guidance for registration purposes comes from the Compendium of U.S. Copyright Practices. The Compendium does not have the force of law but rather is a policy document that guides the Copyright Office's registration practices. The Compendium has several entries on the human authorship requirement, including the following:

- Section 306—The Human Authorship Requirement. This section states that the U.S. Copyright Office will register an original work of authorship "provided that the work was created by a human being." Conversely, it states that because copyright law is limited to "original intellectual conceptions of the author," the Office will refuse to register a claim if it determines that a human being did not create the work (citing the *Burrow-Giles* case).
- Section 313.2—Works That Lack Human Authorship. This section elaborates on the human authorship requirement and states that the Copyright Office "will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author." In 2019 an addition to this section was added, describing the crucial question as "whether the 'work' is basically one of human authorship, with the computer [or other device] merely being an assisting instrument, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually conceived and executed not by man but by a machine."

Copyright Office Rulings on AI-Generated Works

Thaler Ruling

In February 2022, the Copyright Office Review Board confirmed a refusal by the Copyright Office to register an AI-generated work of art titled *A Recent Entrance to Paradise* based on the fact that the applicant, Stephen Thaler, did not claim any human input or intervention in the creation of the work. Rather, Thaler listed the author as "Creativity Machine" and argued that the human authorship requirement is unconstitutional and unsupported by statute or case law.

In rejecting the request, the Copyright Office was unmoved by Thaler's argument that "judicial opinions from the Gilded Age" should not control whether an algorithm can be the author of a copyrighted work. In June, Thaler filed a lawsuit against the Copyright Office, requesting an order that would require the Copyright Office to reinstate the application to register the work. Motions for summary judgment in that case are currently before the U.S. District Court for the District of Columbia.

Kashtanova Ruling

Initial Registration and Revocation Notice

In September 2022, the U.S. Copyright Office raised the hopes of artists who use generative AI by registering a copyright in a graphic novel titled *Zarya of the Dawn*, whose author used the AI tool Midjourney to generate its images. However, the Copyright Office quickly reversed course and notified the applicant, Kristina Kashtanova, that it was reviewing whether the registration should be canceled.

The Copyright Office stated that the registration was made in error because it missed the fact that the images were computer-generated. It asked the artist to provide details of her creative process in order to show that there was sufficient human involvement in the process of creating the graphic novel, citing the Compendium and the *Burrow-Giles* case mentioned above.

Artist's Arguments for Copyrightability

The response filed in answer to the Copyright Office's request to show substantial human involvement argued for the protection of each individual image, based on the active role the artist played in the creation of the graphic novel and its images. The artist compared AI generative tools to using a camera or Adobe Photoshop and calls Midjourney an "assisting instrument."

The artist's response detailed their conscious and creative choices and argued that they engaged in a creative, iterative process that included multiple rounds of composition, selection, arrangement, cropping, and editing for each image. It also pointed to elements such as the visual structure of each image, the selection of the poses and points of view, and the juxtaposition of the various visual elements within each picture and equated this involvement to a photographer's selection of a subject, a time of day, and the angle and framing of an image (which have been found copyrightable).

Kashtanova does not assert that every image generated by the artist using Midjourney is necessarily copyrightable. The focus of the response is that the cumulative effect of multiple rounds of image generation, during each of which the artist refined the prompts used and selected elements of prior versions that should be retained or replaced, results in sufficient human authorship having been incorporated into the final rendered image.

However, the response does argue that the artist's text prompts (many of which were extremely detailed[5]) and other inputs can, by themselves, constitute sufficient human creativity, calling these inputs "the tools by which an author . . . guides the Midjourney service's generation of images consistent with the author's creative vision."

Despite this detailed response describing the applicant's involvement in creating the images, the Copyright Office denied registration for the images in *Zarya of the Dawn* that were generated using Midjourney because it determined that they were not the product of human authorship. The Copyright Office did allow registration of the graphic novel as a whole, based on the applicant's authorship of the text of the novel as well as of the selection, coordination, and arrangement of the novel's written and visual elements. However, this ruling is considered by many to be a blow to those who advocate for the protectability of AI-generated works.

Copyright Office Finds Lack of Predictability Precludes Human Authorship

The Copyright Office based its finding that there was not sufficient human authorship largely on the unpredictability of the

generated output. While it recognized that the artist's prompts may have influenced the generated images, it found that the process was not "controlled" by the artist "because it is not possible to predict what Midjourney will create ahead of time" and "the prompt text does not dictate a specific result." Because of this unpredictability, the Copyright Office concluded the artist was not the "master-mind" behind the images and that it was the Midjourney tool—not Kashtanova—that originated the "traditional elements of author-ship" in the images. The Copyright Office distinguished this from the use of editing or other assistive tools, where users take specific steps to control the final image such that it amounts to the artist's "own original mental conception, to which [they] gave visible form."

The Copyright Office did not agree with Kashtanova's arguments that use of detailed text prompts permitted copyright protection of resulting images because the images are the visual representation of "creative, human-authored prompts." Although the Copyright Office acknowledged that prompts themselves might, in some cases, be sufficiently creative to be copyrightable, it did not find that human input in prompts was sufficient to translate into a copyright interest in the generated work. This result seems to be based on a belief that AI tools act on the ideas the prompts convey (which are not copyrightable) rather than capturing any protected creative expression in the prompts themselves.

The Copyright Office equates providing prompts to an AI tool to a client's provision of general direction to an artist the client is hiring to create a work. Absent qualifying as a work-made-for-hire, it is the artist creating the work and not the one providing instructions who would be recognized as the work's author. Because of the human authorship requirement, however, there can be no work-made-for-hire relationship with an AI tool.

Edits to Generated Images May Be Protectable

The Copyright Office did recognize the possibility that an artist may make sufficient changes to a generated image such that the edited version of such image is sufficiently creative (and contains a sufficient amount of original human authorship) to be entitled to copyright protection. However, with respect to one of

the modified images provided by the artist, which modified the character's lips and mouth, the Copyright Office did not find the changes significant enough to supply the necessary creativity for copyright protection. And with respect to the other change cited by the artist (an image showing an aging face), the Copyright Office indicated it did not have sufficient evidence in the record as to how the image was created to make this determination. Note that where modifications to a generated image would be sufficient to be deemed protectable, such protection would extend only to the modifications that were made.

Reactions to Decision

The Copyright Office's focus on the predictability and control of the output to determine whether there was sufficient human involvement and their requirement of a seemingly high level of human input has been the subject of debate since the decision was issued. In an article responding to the ruling, Kashtanova's lawyer wrote:

> The standard is whether there is a "modicum of creativity," not whether Kashtanova could "predict what Midjourney [would] create ahead of time."

In other words, the Office is incorrectly focusing on the output of the tool rather than the input from the human.

The Copyright Office does not cite specific support for its argument that human authorship requires that the outcome of the generated image be predictable by the human author. Kashtanova's lawyer argues that Jackson Pollock could not predict how the paint he used would drip onto the canvas (as he used a process involving random dripping and flicking of paint) and that photographers do not always have control over the subjects of their photographs (claiming that "there are many examples of famous photographs that captured animals, people, or humorous situations entirely by mistake"). He also argues that AI tools are not as "random" or "unpredictable" as the Copyright Office seems to think. He notes that while the exact output may not be predictable, the artist can exert control by using detailed input to design output that has

a specific subject, lighting, content, layout, and feel, and that it should not matter that the subject, lighting, content, and layout are generated through prompts instead of captured with a device, such as a camera.

It remains to be seen whether the Copyright Office would ever view human input that serves to influence the output, but not fully control it, as sufficient to meet the human authorship requirement. The Copyright Office appears to be indicating that the answer is no, but it seems likely that this decision will be appealed, and a court may have a different take on the questions presented in this case. Kashtanova's lawyer points out that the standard for human creativity required for copyright protection is fairly low ("a modicum of creativity"), which arguably supports the position that even a minimal amount of creative human input or intervention should be sufficient when using AI to meet the human authorship requirement. Where the level of input by a human artist (whether through detailed prompts, other inputs, or otherwise) has a significant creative influence on the generated image (e.g., by providing direction on things like composition, lighting, subject matter, and mood, which were recognized by the U.S. Supreme Court in the *Burrow-Giles* case as sufficient to show human authorship), it is possible that a court could view such input as providing sufficient human authorship. However, this would be a significant departure from the Copyright Office's view of the human authorship requirement.

Copyright Office Guidance on Registration of AI-Generated Works

Shortly after issuing its ruling on the Kashtanova registration, the Copyright Office issued a policy statement regarding its registration practices for registering works created using generative AI systems. The statement does not provide much new information and largely mirrors what the Copyright Office has already stated in the Compendium and in its recent decisions not to register the works created by Thaler and Kashtanova (discussed above). First, the Copyright Office reaffirmed that human authorship is a threshold issue for copyrightability in its view. Second, it reiterates

the statement from the Compendium that characterizes the crucial question as "whether the 'work' is basically one of human authorship, with the computer [or other device] merely being an assisting instrument, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually conceived and executed not by man but by a machine." Although it notes that the answer will depend on how the tool operates and how it was used to create the final work, it makes a clear statement that works generated by AI systems solely in response to a user prompt fall into that category of uncopyrightable, machine-authored works, even if the prompts themselves are sufficiently detailed to be copyrightable.

Left unaddressed in the Copyright Office's policy statement is under what circumstances, if any, there could be sufficient human input such that AI-generated content could ever be found to meet the Copyright Office standard for sufficient human authorship. The Copyright Office did not provide any examples of what degree of control the user of a generative AI system would need to exercise over the formation of a work to be regarded as the work's author. Rather, the Copyright Office only seems to recognize the potential for a copyright interest in any larger work with embedded generative elements (where the selection and arrangement that is exercised over generative elements is sufficiently creative) or in modifications made to material originally generated by AI technology that are sufficiently creative to meet the standard for copyright protection.

Guidance for Applicants

The Copyright Office statement concludes by providing specific guidance for copyright applicants on how to address the inclusion of AI-generated content in a work submitted for registration (which, it notes, applicants have a duty to disclose). The guidance states that:

- Individuals who use AI technology in creating a work and wish to claim copyright protection for their contributions to that work should provide a brief statement in the "Author Created" field that describes the authorship contributed by a human.

- Applicants should not list an AI technology or the company that provided it as an author or co-author simply because the applicant used it when creating the work.
- AI-generated content that is more than de minimis should be explicitly excluded from the application by providing a brief description in the "Limitations of Claims" section. Applicants who are unsure how to proceed can simply provide a general statement that a work contains AI-generated material, and the Copyright Office will contact them.
- Applicants who have already submitted an application for a work containing AI-generated material should make sure they disclosed that material, and if not, they should take steps to correct the information.
- Applications that have already been processed and resulted in registration need to be corrected in the public record by submitting a supplementary registration.
- Applicants who fail to properly disclose information about AI-generated material in their applications or to update the public record after obtaining a registration for material generated by AI risk losing the benefits of the registration.

New Copyright Office AI Initiative

At the same time that it issued its policy statement, the Copyright Office also announced a new initiative to examine the copyright law and policy issues raised by AI. This initiative will address both the scope of copyright in AI-generated work as well as the use of copyrighted material to train AI models. The Copyright Office held several public-listening sessions in the spring , which provided opportunities for participants to share their views on issues related to the use and impact of generative AI in creative fields. And later this year, the Copyright Office plans to publish a notice of inquiry to solicit public comments on copyright issues arising from the use of AI. This is similar to what the U.S. Patent and Trademark Office (USPTO) did in 2020, resulting in its

report on "Public Views on Artificial Intelligence and Intellectual Property Policy."

If AI-Created Works Are Copyrightable, Who Is the Author?

If copyright ownership of AI-generated content is possible, the next question, of course, would be, "Who is the author and owner of such rights?" Is it the user who directed the generation of the content using the tool? Or the platform providing the tool? Or is it whoever trained the models used in the tool? The answer likely depends on who provided the human input or intervention (if any) that is determined sufficient to qualify for authorship, which could vary depending on the facts of a particular situation.

How Do Other Countries Treat AI-Generated Works?

A number of countries take the same approach as the United States and require human authorship, including Australia, Brazil, Colombia, Germany, Mexico, and Spain. However, there are a number of jurisdictions, including the Hong Kong, India, Ireland, New Zealand, South Africa, and United Kingdom, that specifically recognize (by statute) copyright protection for computer-generated works. The author is typically "the person by whom the arrangements necessary for the creation of the work are undertaken."[6] In some cases, the term of copyright protection may differ for computer-generated work and "moral rights" (the right to be identified as the author and to object to derogatory treatment of work) do not apply.

Although the United States does not currently take this approach, there have been some calls to reconsider this position. In October 2022, Senators Thom Tillis and Chris Coons wrote a letter to the Copyright Office and USPTO requesting them to jointly establish a national commission on AI to consider "what changes to existing law, if any, should be made in order to continue encouraging the robust development of AI and AI-generated inventions and creations." In its response to this request, the Copyright Office notes that it is planning to issue a "public notice of inquiry" on questions

involving copyright and AI later in 2023, which is referenced in the recent guidance it issued as discussed above.

Addressing Questions of Copyrightability and Ownership in Agreements Involving Generative AI

Although the law is not yet fully settled in this area, the recent Copyright Office actions demonstrate that there are significant questions about the copyrightability and ownership of AI-generated works. This uncertainty surrounding the status of AI-generated works must be taken into account when drafting or negotiating agreements regarding machine learning or AI-generated outputs.

Representations, warranties, indemnifications and other guarantees related to the protectability or ownership of AI-generated works (including trained models) is an area that warrants particular care and attention. While those contracting with respect to AI-generated materials may want some assurances on these points, those providing such materials may not be in a position to offer such assurances, given the lack of legal certainty in this area.

Contracting parties may also not be able to rely on traditional copyright law defaults related to ownership and use rights to control what the parties can and cannot do with respect to AI-created works, as such materials may not be subject to copyright. For greater certainty and to help future-proof agreements for an evolving legal landscape, parties may want to expressly address these bedrock issues in agreements by providing contract terms specifying how works generated by the tool may (or may not) be used. However, those subject to contractual restrictions on how AI-generated works may resist such limitations, given that third parties may be able to freely use the work if they are found not to be copyrightable. In any event, the parties may still want to address who would own the copyright in the event that copyright protection is available, as the law is still evolving.

Choice of law will also be an important consideration in agreement with non-U.S. entities. As noted above, countries exhibit considerable variation in their approaches to the protectability of

AI-generated works and these differences will likely grow as legislation is adopted in various jurisdictions on the question.

Takeaways

Undoubtedly, the Copyright Office's recent decisions and guidance will not be the last word on the copyrightability of AI-generated works.[7] However, these recent developments should be taken into account when artists and companies utilize generative AI tools.

- Those using generative AI tools need to be aware that there is great uncertainty as to whether they will be able to claim copyright protection in the output, regardless of the creative process they have engaged in. Using the recent decisions as a benchmark, it seems the Copyright Office will almost certainly refuse registration of an unmodified computer-generated image.
- To maximize potential arguments for human authorship, it will still be important to make sure there is significant human input in the image-generation process (whether through detailed prompts or otherwise) that goes beyond mere ideas, and that can be shown to significantly shape and control the final creative output. Such human input should be documented as infringement and ownership disputes may center on the question of copyrightability.
- It is also important to clearly document any changes made by a person to generated images, as the Copyright Office did indicate it would register works containing otherwise unprotectable material that have been edited, modified, or otherwise revised by a human author if the new work contains a "sufficient amount of original authorship" to itself qualify for copyright protection.
- Applicants who are attempting to register, or who have already registered, works that include more than a de minimis amount of AI-generated materials must adequately disclose the inclusion of such materials or risk losing the benefits of registration. Such applicants should

review the Copyright Office guidance (described above) when preparing applications (or to determine whether they need to update their application or registration).
- Uncertainty as to the copyrightability and ownership of AI-generated materials should be taken into account when entering into agreements that involve such materials.

Notes

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1. Burrow-Giles, 111 U.S. at 58.
2. Urantia Foundation, 114 F.3d at 958.
3. *Id.* at 959.
4. CONTU, Final Report at 45-46 (1978).
5. One prompt was as follows: "sci-fi scene future empty New York, Zendaya leaving gates of Central Park and walking towards an empty city, no people, tall trees, New York Skyline forest punk, crepuscular rays, epic scene, hyper realistic, photo realistic, overgrowth, cinematic atmosphere, ethereal lighting."
6. *See, e.g.*, Copyright, Designs and Patents Act, 1988, § 9(3) (UK).
7. Kashtanova has already filed with the Copyright Office to register another work created with generative AI tools that Kashtanova argues embodies sufficient human authorship to be registrable.