(HU)MAN VS. MACHINE: COPYRIGHTABILITY OF WORKS GENERATED USING ARTIFICIAL INTELLIGENCE VIA USER PROMPTS

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I: SETTING THE SCENE

"[C]opyrighted works and technological development have a long history of coming out stronger together."[1]

Throughout history, the changing needs of the future have required copyright law to adapt its contours.[2] Emerging technologies have consistently enabled creators to explore new dimensions with their creative works and provided new ways to share those works with others.[3] Recognizing the need for change, lawmakers have responded with "good, clear, practical copyright law" in an effort to "reward" creators and

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1. Brad Greenberg, *Copyright Law and New Technologies: A Long and Complex Relationship*, LIBR. OF CONG. BLOGS: COPYRIGHT CREATIVITY AT WORK (May 22, 2017), https://blogs.loc.gov/copyright/2017/05/copyright-law-and-new-technologies-a-long-and-complex-relationship/.

2. *See* Statute of Anne 1710, 8 Ann., c. 19 (Gr. Brit.) (printing press); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (photography); White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908) (player pianos); Act of Aug. 24, 1912, Pub. L. No. 62-303, § 5, 37 Stat. 488 (motion pictures); Mazer v. Stein, 347 U.S. 201 (1954) (works of art as useful articles); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960) (designs printed on fabric); Midway Mfg. Co. v. Arctic Int'l, Inc., 547 F. Supp. 999 (N.D. Ill. 1982) (video game chips); London-Sire Recs. v. Doe 1, 542 F. Supp. 2d 153 (D. Mass. 2008) (digital transmission of electronic files containing copyrighted works); Cartoon Network v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008) (digital video recorders); Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431 (2014) (streaming television); Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (digital music providers).

3. *See* Greenberg, *supra* note 1.

"encourage the arts and humanities,"[4] as urged by the U.S. Constitution.[5] Recently, another "new" technology has caught the attention of both creators and lawmakers: artificial intelligence ("AI"). Recognizing the "benefits" of AI will enable "small . . . entrepreneurs" to "continue to drive innovation."[6]

Despite computer-generated works being in its viewfinder as far back as 1965,[7] the U.S. Copyright Office struggled to provide clear guidance on how to protect creations made with the help of machines. Both the Copyright Office and the court were provided opportunities to offer this clarity through their decisions on AI-generated works. However, both continually relied on the 1976 Copyright Act's human authorship requirement to deny—or even cancel—protection for these works. Both authorities' opinions consistently reflected an openness to register works that met a certain threshold of human input, but those writing them remained silent as to what that threshold was.

In January 2025, the Copyright Office released part two of its report on copyright and artificial intelligence ("Report").[8] The Report provided that original elements from "human-authored expressive inputs" and the "selection and arrangement" of alterations to AI-generated works could qualify for copyright protection.[9] However, protection remains unavailable for original output generated through a user's prompts that cause AI systems to effectuate the creative vision.[10] As was true before the Report, creators

4. U.S. COPYRIGHT OFF., SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1965, at 2 (1966), https://www.copyright.gov/reports/annual/archive/ar-1965.pdf [hereinafter SIXTY-EIGHTH ANNUAL REPORT].

5. U.S. CONST. art. I, § 8, cl. 8 (establishing Congress's power to grant authors limited monopolies over their works to "promote the Progress of Science and useful Arts").

6. Exec. Order No. 14110, 3 C.F.R. 657, 658 (2024) (regarding the "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence").

7. *See* SIXTY-EIGHTH ANNUAL REPORT, *supra* note 4, at 4, 5.

8. U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2: COPYRIGHTABILITY (Jan. 2025) [hereinafter 2025 REPORT]. After issuing a Notice of Inquiry in August 2023, the Copyright Office "received more than 10,000 comments" from the public across a wide range of sectors, including "authors and composers, performers and artists, . . . [and] lawyers and academics . . . " *Id.* "Preface." The Copyright Office originally pledged to publish this Report in the summer of 2024. Letter from the Register of Copyrights of the U.S. to U.S. Intell. Prop. Subcomms. (Feb. 23, 2024), https://www.copyright.gov/laws/hearings/USCO-Letter-on-AI-and-Copyright-Initiative-Update.pdf.

9. 2025 REPORT, *supra* note 8, at 22-27. In the case of expressive inputs, any AI-generated elements in the output must still be disclaimed from a copyright application, preventing protection of those elements. *Id.* at 23. Where AI-generated content is modified or arranged by a user, that human's selection, coordination, and arrangement of AI-generated elements may "provide protection for the output as a whole" as a compilation. *Id.* at 24. But the AI-generated elements are still unprotectible on their own. *Id.* Consequently, regardless of the type of assistance AI provides, any generated output is not protectible. *Id.*

10. This note specifically addresses the use of prompts to generate completely original outputs and the protection to which these works should be entitled.

can only hope to protect the "selection and arrangement" of generated elements, and not the elements themselves.

While it may be a valiant effort, the Report does not address the problems creators face head-on. Creators' works are still susceptible to unfair exploitation by others, antithetical to the original intent of copyright laws. The Copyright Office must reconsider its position on the copyrightability of works generated with AI tools using human-created prompts. After taking an aerial view of both the relevant copyright law and AI functions in Part II, Part III zooms in on the current state of AI copyrightability and the problems it poses for creators across many artforms. Part IV proposes a process for copyrighting works generated by AI through the use of prompts, enabling creators to completely protect their creations and exclusively exploit the fruits of their labor.[11] Doing so, as concluded in Part V, will encourage the continued creation and dissemination of creative works—even those made using innovative technologies—further serving the purpose of copyright law.

II: THE BACKDROP OF COPYRIGHT AND AI

A. A Panoramic View of Copyright

The first copyright law was enacted by Great Britain's Parliament over three hundred years ago.[12] After the invention of the printing press, literary works were often reproduced without the authors' consent and sold for high profits—none of which were the authors' to enjoy.[13] The Statute of Anne granted authors exclusive control over who could reproduce their literary works and imposed fines on anyone who did so without their permission.[14] Since then, lawmakers have consistently recognized the need to protect creators. Allowing them to reap the rewards of their intellectual labors encourages creation of more works. In turn, society is enriched when these works are disseminated to the world at large and, later, become part of the public domain. This aim was so important that Congress's power "[t]o

11. The author does not intend to rely on the "sweat of brow" doctrine. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 352 (1991). It is well established that effort alone is insufficient for copyright protection. *Id.* at 357.

12. *See* Statute of Anne 1710, 8 Ann. c. 19 (Gr. Brit.) ("An act for the encouragement of learning").

13. *See id.* at § I.

14. *Id.* at § II.

promote the Progress of Science and useful Arts" was written into the U.S. Constitution.[15]

As it stands in 2025, U.S. copyright law protects "original works of authorship fixed in any tangible medium of expression" that fall into certain enumerated categories.[16] The originality threshold is very low, requiring only "independent creation" and a "modicum of creativity."[17] Only where "the creative spark is utterly lacking" will works be found so unoriginal as to be "incapable of sustaining" copyright protection.[18] In *Burrow-Giles Lithographic Co. v. Sarony*, the Court held the person who produced a photograph to be its author.[19] The photographer's camera actually captured the photograph – a "mere mechanical reproduction" of its subject – but the camera was only a tool used by the photographer to depict his "idea, fancy, or imagination."[20] Even though the photograph partially reproduced elements found in nature, the overall result came from the photographer's "original mental conception" in selecting and arranging what are now the traditional elements of authorship of a photograph including pose, backdrop, use of light, and the expression of the subject.[21]

Neither "author" nor "authorship" are defined in the text of the Copyright Act, but copyright law has long been interpreted to require *human* authorship.[22] In 1884, the Supreme Court implied this by stating "the author is the *man* who" creates and referring to copyright as the "exclusive right of a *man*."[23] In a 1997 decision, the Ninth Circuit denied copyright protection to non-human "celestial beings" claimed to be the authors of a book because only the "first human beings" whose contribution led to an "original work of authorship" are eligible for protection.[24] The court added that "some element

15. U.S. CONST. art. I, § 8, cl. 8. Subsequently, the first U.S. copyright statute, enacted in Connecticut in 1783, was titled "An Act for the Encouragement of Literature and Genius." Benjamin W. Rudd, *Notable Dates in American Copyright 1783-1969*, 28 Q.J. LIBR. CONG. 137, 137 (1971). Further references have been made to "cherishing genius" and the "encouragement of learning." *Id.* at 137, 138. The preservation of "worthy works for the diffusion of knowledge" is one purpose behind the Copyright Office's deposit requirement for copyrighted works. Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30, 50 (1939) (Black, J., dissenting).

16. 17 U.S.C. § 102(a).

17. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).

18. *Id.* at 359.

19. *See* 111 U.S. 53, 55 (1884).

20. *Id.* at 59, 61.

21. *Id.* at 59, 60.

22. *See* Thaler v. Perlmutter, 687 F. Supp. 3d 140, 147 (D.C. Cir. 2023); *see also* 17 U.S.C. § 101 (The enumerated definitions do not include these terms.).

23. *Burrow-Giles*, 111 U.S. at 58, 61 (emphasis added).

24. Urantia Found. v. Maaherra, 114 F.3d 955, 958 (9th Cir. 1997) (internal quotations omitted).

of human creativity" is required.[25] Then, in 2018, in deciding whether a monkey could hold the copyright in a photo it took of itself, the Ninth Circuit concluded that terms such as "children" and "widower" in the Copyright Act "all imply humanity."[26] As a consequence, animals—not being human—could not bring claims under the Copyright Act.[27]

B. A Focus on Generative AI

Relevant to the issue of copyright protection for creative works is generative AI.[28] Generative AI systems are trained on large sets of data provided by their developers.[29] Depending on the purpose of a particular AI tool, the data set will differ. An image-generating system may be trained on pre-existing paintings, drawings, sculptures, and the like, whereas a music-generating system may be trained on different musical genres, instrumentation, and vocal ranges.[30] In AI's own words, although its output is "generated based on patterns and information" found in the training data, AI uses what it learns to "create new and imaginative content."[31] To do so, human users input prompts that guide AI in creating "something that didn't exist before."[32] The goal is to transform these prompts into outputs "that match the artist's intent."[33] As these prompts get more specific, the final output reflects a deeper level of human control.[34] AI "is still a tool that

25. *Id.*

26. Naruto v. Slater, 888 F.3d 418, 420, 426 (9th Cir. 2018).

27. *Id.* at 426.

28. The scope of this article is limited to creative works that fall into the categories enumerated in the Copyright Act.

29. *See, e.g.*, *What is ChatGPT?*, OPENAI, https://help.openai.com/en/articles/6783457-what-is-chatgpt (last visited Oct. 22, 2024); *About DALL-E,* OPENAI, https://labs.openai.com/about (last visited Oct. 22, 2024); Shehmir Javaid, *Generative AI Data in 2023: Importance & 7 Methods*, AIMULTIPLE (Jan. 3, 2024), https://research.aimultiple.com/generative-ai-data/.

30. *See* Joseph Wakelee-Lynch, *AI's Impact on Artists*, LMU MAG. (Apr. 26, 2023), https://magazine.lmu.edu/articles/mimic-master/; *AI-generated Music: Is it a Growing Threat of Creating New Opportunities for Artists?*, SG ANALYTICS (Aug. 29, 2024), https://www.sganalytics.com/blog/ai-generated-music-creating-new-opportunities-for-artists/.

31. OpenAI, *Response to "Are You Capable of Generating Original Creative Works?"*, CHATGPT (Dec. 22, 2023), https://chat.openai.com/share/6c27de1a-9876-4c94-bfbb-c3470571119 9.

32. *The Future of Generative AI: Expert Insights and Predictions*, HARVARD ONLINE (Apr. 11, 2023), https://www.harvardonline.harvard.edu/blog/future-generative-ai (quote from Harvard Professor Latanya Sweeney at approximately 00:07:06 into the webinar).

33. Van Lindberg, *Building and Using Generative Models Under US Copyright Law*, 18 RUTGERS BUS. L. REV., no. 2, 2023, at 1, 24 (2023).

34. *Id.* at 23.

requires human involvement."[35] Because AI systems are incapable of thinking creatively, they serve better as tools for creation rather than as creators.[36]

The possibility concededly exists that generative AI users may attempt to recreate pre-existing works, but most focus on generating only original creative works.[37] The biggest danger of duplication lies in "overtraining" AI systems.[38] When a machine is given more information than needed to accurately predict patterns,[39] there is a chance that common "elements or phrases" from the data set "could appear" in generated content.[40] In reality, studies have shown the risk of duplication to be low.[41] Identical reproductions of computer source code (a copyrightable creation) generated using AI have occurred only about one percent of the time, and reproductions of images occurred even less frequently—at a rate of .0003% of test images.[42] Even when researchers were aware of the data used to train an AI model—and so could better attempt to recreate the test images—only 109 generated images were "successfully visually similar," a total of three percent.[43] Even these reproduced images contained "trivial" variations to distinguish them from the originals.[44] When properly trained, one AI tool touts that the risk of duplication is "practically impossible."[45]

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35. Rachel Ackerman, *Is the World Ready to Accept Artificial Intelligence as an Inventor?*, 72 DEPAUL L. REV. 835, 863 (2023).

36. *See id.* (quoting David McCombs et al., *Where We Are on AI Inventorship and Where We Should Be Heading*, IPWATCHDOG (Oct. 12, 2021, 7:15 AM), https://perma.cc/Z4EK-RL4G).

37. Lindberg, *supra* note 33, at 62.

38. *Id.* at 17.

39. *See id.*

40. OpenAI, *Response to "Are Pre-existing Elements Recognizable in Generated Works?"*, CHATGPT (Dec. 22, 2023), https://chat.openai.com/share/6c27de1a-9876-4c94-bfbb-c34705711199 (explaining that "well-known cultural references, famous quotes, or common idiomatic expressions" in a user's prompts may lead to their inclusion in generated content).

41. *See* Lindberg, *supra* note 33, at 18. The Copyright Office uses this unpredictability of AI outputs to bolster its position that humans cannot exert sufficient control over AI systems. *See* 2025 REPORT, *supra* note 8, at 6-7. This is addressed below in Part III.

42. *See* Lindberg, *supra* note 33, at 18 (citing a 2023 study by Nicholas Carlini et al. that further reduces the probability of duplication to 0.0000000018% when compared to the entire training dataset as well as internal research from the AI developer platform GitHub's website). As of November 19, 2023, GitHub's FAQs still assert matches are made less than one percent of the time. Microsoft, *Response to FAQ "What Are the Intellectual Property Considerations When Using GitHub Copilot?"*, GITHUB, https://github.com/features/copilot (last visited Nov. 19, 2023).

43. Lindberg, *supra* note 33, at 57.

44. *Id.* at 58.

45. *Will AIVA Create the Same Track Twice?*, AIVA HELPDESK, https://aiva.crisp.help/en/article/will-aiva-create-the-same-track-twice-a7cgnf/ (last updated Jan. 9, 2020).

In fact, most generated works are "new and different."[46] At least one AI model is capable of producing "photographs of human faces" that do not resemble anyone in existence.[47] "Unique" songs can be generated by providing parameters such as genre, instrumentation, mood, and length.[48] One AI tool can even "create unique and distinctive logos" for a brand.[49] Perhaps one reason for this is that AI systems do not store pieces of the pre-existing works used to train them; they merely store data about those works.[50] As a result, AI output cannot contain actual elements of a pre-existing work—only new data generated in response to a user's prompts. Some AI systems may be intentionally programmed to generate output that differs from any of their training data.[51]

C. Double Exposure – Where Copyright and AI Meet

So, how do these two worlds collide? AI can be used to generate original creative works that fall into several categories protectable under copyright law, such as paintings, songs, stories, poems, audiovisual works, and more.

To test it out, I entered a prompt into ChatGPT with keywords to track some of the traditional elements of literary works,[52] such as short story (category of work), vampire hunter (theme), 1800s Romanian winter (setting), female with dark hair, dark eyes, and a specified weapon (character) with a secret she must confront and overcomes in the end (plot). Exact language from the prompt found a place in the generated story. And even though a quick plagiarism check revealed thirteen writing errors, it

46. Richard H. Chused, *Randomness, AI Art, and Copyright*, 40 CARDOZO ARTS & ENT. L.J. 621, 650 (2023).

47. Arham Islam, *A History of Generative AI: From GAN to GPT-4*, MARKTECHPOST (Mar. 21, 2023), https://www.marktechpost.com/2023/03/21/a-history-of-generative-ai-from-gan-to-gpt-4/ (referring to Generative Adversarial Networks ("GANs")).

48. Bernard Marr, *Beyond ChatGPT: 14 Mind-Blowing AI Tools Everyone Should Be Trying Out Now*, FORBES (Feb. 28, 2023, 2:31 AM), https://www.forbes.com/sites/bernardmarr/2023/02/28/beyond-chatgpt-14-mind-blowing-ai-tools-everyone-should-be-trying-out-now/?sh=1f3cc0387a1b (describing Soundraw).

49. *Id.* (describing Looka).

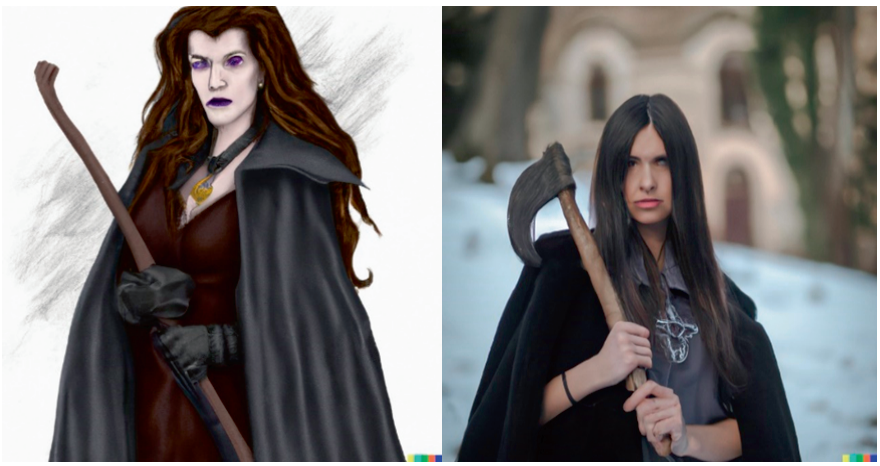
50. *See* Lindberg, *supra* note 33, at 44.

51. *See* Chused, *supra* note 46, at 624 (discussing an AI system referred to as a Creative Artificial Network ("CAN")).

52. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121-22 (2d Cir. 1930) (considering plot, characters, and theme when analyzing the scope of copyright in a literary work).

uncovered no plagiarism.[53] If not the most entertaining story, it certainly seemed to be an original literary creation.[54]

Going a step further, I used DALL-E to generate an illustration for the cover of this future best-seller. Again, the prompt was detailed and specific[55] and contained keywords related to traditional character elements.[56] And, of course, the vampiress needed a theme song. As a creator, where can I go from here?



In 2023, the Copyright Office issued guidance on registering works created with the assistance of generative AI for copyright protection.[57] This guidance provided 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*

53. *Plagiarism Checker*, GRAMMARLY, https://www.grammarly.com/plagiarism-checker (last visited Oct. 25, 2024).

54. Luckily, as the court has determined, decisions on aesthetic appeal are a "dangerous undertaking" for those "trained only to the law" and are better left to the public. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).

55. *See* OpenAI, *Prompt Used to Generate Images*, DALL-E, https://labs.openai.com/s/dwm4cYzKP7CogsPWhdhjTQua (last visited Oct. 14, 2023) (including "female vampire hunter with dark hair, dark eyes, and a sickle . . . in 1800s Romania . . . in winter," "fierce vampire hunter," and "dark secret inside").

56. *See* DC Comics v. Towle, 802 F.3d 1012, 1019-23 (9th Cir. 2015) (considering physical and conceptual qualities, consistent and identifiable character traits and attributes, and unique elements of expression in deciding whether the Batmobile was a character entitled to copyright protection).

57. *See generally* Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202).

author.'"[58] The Copyright Office stated that human authorship will not be called into question in "some cases"[59] and hearkened back to the "crucial question" first presented in 1965—whether a work's traditional elements of authorship "were actually conceived and executed not by man but by a machine."[60] When AI tools are used, an inquiry into the circumstances of each case will be required to determine "how the AI tool operates" and "how it was used to create the final work."[61] Using this framework, the Copyright Office established what did *not* meet its standards but provided little guidance as to what would.[62] The only option available to creators is to disclaim AI-generated portions of a work that are "more than *de minimis*" on the copyright application, which automatically results in those portions' ineligibility for copyright.[63]

The Report did nothing to change this outcome. Copyrightability of AI-generated outputs "will turn on the nature and extent of a human's contribution" and whether such contribution "qualifies as authorship" of an output's "expressive elements."[64] While the Copyright Office stated in 1965 that it would not "'take the categorical position'" that the use of a computer "'in some manner'" precludes copyright registration,[65] it still denies protection to AI-generated elements. The only elements protected are "the human author's contribution[s]."[66] An applicant must still disclaim any AI-generated elements that are more than *de minimis*.[67] Sufficient "selection and arrangement" may qualify an AI-generated work to be copyrighted "as a whole."[68] But this promise is illusory. Any elements generated by the AI tool are still unprotectable standing alone. Without a copyright registration and the protection it provides, U.S. copyright owners cannot "enforce their exclusive rights in court,"[69] leaving them powerless against others who may exploit a creator's works for their own benefit.

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58. *Id.* at 16192 (quoting U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, § 313.2 (3d ed. 2021)) (emphasis added).

59. *Id.* at 16193.

60. SIXTY-EIGHTH ANNUAL REPORT, *supra* note 4, at 5.

61. Copyright Registration Guidance, 88 Fed. Reg. at 16192.

62. *See generally* Copyright Registration Guidance, 88 Fed. Reg at 16190.

63. Copyright Registration Guidance, 88 Fed. Reg. at 16193.

64. 2025 REPORT, *supra* note 8, at 1.

65. *Id.* at 2 (quoting U.S. COPYRIGHT OFF., ANNUAL REPORT OF THE EXAMINING DIVISION, COPYRIGHT OFFICE, FOR THE FISCAL YEAR 1965, at 4 (1965), https://www.copyright.gov/reports/annual/archive/ar-1965.pdf)

66. 2025 REPORT, *supra* note 8, at 3.

67. *Id.*

68. *Id.* at 1.

69. *Id.* at 2 n.5.

Under the Report's new guidelines, my seemingly one-of-a-kind vampire creations would still not be the product of "enough" human authorship to merit copyright protection because they were created using prompts. But where a human dictates the so-called traditional elements of authorship using a prompt and generative AI merely carries out the action—a mere mechanical reproduction of the user's vision—the result appears no different than a photograph designed by the photographer and spit out by a Polaroid camera. The AI system is not making "expressive choices," as the Copyright Office suggests.[70] The user "'actually creates the work'" through the use of a prompt, and the AI system provides a "mechanical transcription."[71] There is no "intellectual modification"[72] by a machine that is, by definition, not intellectual.[73]

III: A SNAPSHOT IN TIME

Decision makers continually sidestepped the how-much-is-enough question in their previous opinions. In denying copyright protection to AI-generated works, they conceded such works could possibly be protected. But they did not attempt to illustrate what merits protection. Instead, they relied solely on the human authorship requirement because, in their view, a computer is not a human. And they have done their best to distinguish the use of AI from the use of a tool like a camera—widening the gap between AI-generated works and copyright.

In 2018, Steven Thaler attempted to register a copyright in an AI-generated work of art entitled *A Recent Entrance to Paradise*.[74] On the application, Thaler listed "Creativity Machine" as the author and indicated the computer "autonomously" created the work using an algorithm.[75] The Copyright Office refused registration on the ground that the work "lack[ed] the human authorship necessary" for copyright protection because there was no evidence any human provided "sufficient creative *input* or intervention."[76] Because Thaler chose not to claim any human contribution to *Paradise*, there was no reason to "determine under what circumstances human involvement . . . would meet the statutory criteria for copyright protection" for AI-

70. *Id.* at 12.

71. *Id.* at 10.

72. *Id.* at 10 n.56.

73. *See* Ackerman, *supra* note 35, at 863.

74. *See* U.S. Copyright Off. Rev. Bd., Opinion Letter Re: Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise 1 (Feb. 14, 2022), https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf [hereinafter Thaler Letter].

75. *Id.* at 2.

76. *Id.* (emphasis added).

generated works.[77] Instead, Thaler twice tried to argue the human authorship requirement was unconstitutional.[78] The Copyright Office quickly shut this argument down, relying on "statutory text, judicial precedent, and longstanding Copyright Office practice" to reiterate human authorship as a "prerequisite to copyright."[79] The Copyright Office affirmed its denial after two reconsideration requests, leaving Thaler's art unprotected.[80]

The U.S. District Court in D.C. upheld the Copyright Office's decision in 2023, proclaiming human authorship "is a bedrock requirement of copyright."[81] The court's opinion left more "challenging questions" for another day, including the amount of human input required to qualify an AI user as an author.[82] In Thaler's case, the court addressed only whether works generated autonomously by a computer were copyrightable.[83] In the "absence of any human involvement," by Thaler's own admission, the court's answer was an easy "no."[84]

In 2022, Kristina Kashtanova applied for copyright registration in a comic book, *Zarya of the Dawn*.[85] Unlike Thaler, Kashtanova listed herself as the book's author on the registration application and did not disclose the use of AI-generated illustrations.[86] The book's cover, however, listed Midjourney—the AI tool she used—below her own name.[87] *Zarya* was quickly granted copyright protection in 2022.[88] However, upon learning of Kashtanova's use of AI through social media, the Copyright Office requested she justify the book's registration or face cancellation.[89]

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77. *Id.* at 3 n.3.

78. *See id.* at 2.

79. *Id.* at 3.

80. *See id.* at 1, 2.

81. Thaler v. Perlmutter, 687 F. Supp. 3d 140, 146 (D.C. Cir. 2023), *appeal docketed*, No. 23-5233 (D.C. Cir. Oct. 18, 2023).

82. *Id.* at 149.

83. *Id.*

84. *Id.* at 150.

85. *See* U.S. Copyright Off., Opinion Letter Re: Zarya of the Dawn (Registration # VAu001480196) 2 (Feb. 21, 2023), https://www.copyright.gov/docs/zarya-of-the-dawn.pdf [hereinafter Zarya Letter].

86. *Id.*

87. *Id.* In its correspondence, the Copyright Office pointed out there was "no indication of the intent or meaning of the word on the cover" and the use of the word provided no notice that an AI tool had been used. *Id.* at 2 n.2.

88. *Id.* at 1.

89. *Id.* at 2-3.

In a letter to the Copyright Office, Kashtanova insisted she "author[ed] every element of the Work," using AI only as a "tool."[90] The letter asserted the images "were *designed* by Kashtanova," who "consciously chose[]" the images' "visual structure," "poses and points of view," and the "juxtaposition of . . . various visual elements."[91] Prompts used to generate the illustrations included "dark skin hands holding an old photograph," "holographic elderly white woman" with "curly hair" "inside a spaceship," and "empty city, no people, tall trees, New York Skyline forest punk . . . overgrowth."[92] Some of Kashtanova's prompts included "up to hundreds of words."[93] All of these words "conceived, created, selected, refined, cropped, positioned, framed, and arranged" the elements of the illustrations, reflecting Kashtanova's "artistic vision."[94]

Ultimately, the Copyright Office canceled *Zarya*'s original registration for "failure to exclude non-human authorship."[95] The Copyright Office modified the registration to protect the book's text and the "selection, coordination, and arrangement of . . . written and visual elements," but the illustrations standing alone were no longer protected.[96] In its review, the Copyright Office explored Midjourney's functions.[97] The Office found that a user's prompts merely "influence" the system's output and do not "dictate" the final result, comparing the process to hiring a human portraitist and providing specific instructions.[98] The artist would "determine[] how best to express" these instructions and would be the author of any art he or she created.[99] Similarly, the Office concluded, the AI tool lacked sufficient user control to make it "possible to predict what" may be generated based on the prompts.[100] Therefore, the AI machine, not the human Kashtanova, "originated the [images'] 'traditional elements of authorship.'"[101] The Copyright Office limited its determination to the circumstances of

90. Letter from Van Lindberg, Taylor English Duma LLP, on behalf of Kristina Kashtanova, to Robert J. Kasunic, Assoc. Reg. of Copyrights and Dir. of Registration Pol'y and Prac. at 1 (Nov. 21, 2022), https://www.copyright.gov/docs/zarya-of-the-dawn.pdf.

91. *Id.* at 4.

92. *Id.* at 7, 8, 9.

93. *Id.* at 10.

94. *Id.* at 13.

95. Zarya Letter, *supra* note 85, at 12.

96. *Id.* at 1.

97. *Id.* at 5-10.

98. *Id.* at 9, 10. Commenters have rejected this idea because, where a user prompts an AI system "to create a particular expressive result," that is the result the user will achieve. *See* 2025 REPORT, *supra* note 8, at 14.

99. Zarya Letter, *supra* note 85, at 10.

100. *Id.* at 8.

101. *Id.*

Kashtanova's case, stating it was "possible" that other AI systems may operate differently.[102]

Also in 2022, Jason M. Allen attempted to register an AI-generated, two-dimensional work of art entitled *Théâtre D'opéra Spatial*.[103] *Théâtre* was the first AI-generated image to win a fine art competition at the Colorado State Fair.[104] Like Kashtanova, Allen claimed to be the work's author and did not disclose the use of generative AI on his application.[105] The Copyright Review Board was aware the work was created using the same AI system as *Zarya* and requested additional information from Allen.[106] In his response, Allen asserted his prompts were responsible for the work's focus, tone, and scene through "big picture description[s]."[107] The Board affirmed its initial denial, finding Allen's "sole contribution" was generating the text prompts Midjourney used to create the "complex" image.[108] Allen did not exert "creative control" over the work.[109]

The 2025 Report asserts that there is no "need for legislative change" to existing copyright law.[110] But the existing copyright law does not provide protection to all creative works. The Report states that "prompts do not alone provided sufficient control[]" over AI-generated output.[111] For the Copyright Office, "gaps between prompts" and outputs illustrate a lack of user control.[112] An AI system may "include content . . . not specified" in a prompt or "exclude content" that was contained.[113] This, the Copyright Office

102. *Id.* at 10.

103. *See* U.S. Copyright Off. Rev. Bd., Opinion Letter Re: Second Request for Reconsideration for Refusal to Register Théâtre D'opéra Spatial (SR # 1-11743923581; Correspondence ID: 1-5T5320R) 1-2 (Sept. 5, 2023), https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf.

104. *Id.* at 2.

105. *Id.*

106. *Id.*

107. *Id.* at 3, 6.

108. *Id.* at 6, 7.

109. *Id.* at 7. As of November 2023, neither Kashtanova nor Allen have appealed their denials in federal court. In December 2023, the Copyright Office again cited insufficient human authorship to deny registration to a two-dimensional work of art titled "SURYAST." U.S. Copyright Off. Rev. Bd., Opinion Letter Re: Second Request for Reconsideration for Refusal to Register SURYAST (SR # 1-11016599571; Correspondence ID: 1-5PR2XKJ) 3 (Dec. 11, 2023), https://www.copyright.gov/rulings-filings/review-board/docs/SURYAST.pdf. Because the applicant uploaded a photograph into a generative AI tool that was used to manipulate the image, *id.* at 2, SURYAST falls outside the scope of this article that focuses on original output created solely in response to a user's prompts.

110. 2025 REPORT, *supra* note 8, at iii.

111. *Id.*

112. *Id.* at 19.

113. *Id.* at 6.

claims, gives the AI system the responsibility of "determining the expressive elements" contained in any output.[114] Users "do not control" how the prompts are processed "in generating the output."[115] But AI systems do not think; they cannot subjectively interpret specific commands.[116] Any output generated is based on instructions provided via a user's prompts.[117]

The Report also advances that "moving from one medium to another requires interpretation" and such interpretation minimizes the level of human control over any output.[118] However, this cannot be the benchmark by which copyrightability is decided. If that were the case, live singing into a microphone that records a vocal to tape would be considered an "interpretation." Any machine used to "fixate" an original work would preclude copyright protection—even a camera that has already been deemed an assistive tool.

Further, the Report indicates that "identical prompt[s]" may lead to different outputs, which makes AI systems "unpredictable."[119] Yet some systems may allow users to set a "seed" value to control AI outputs and "generate consistent results," when using identical prompts.[120] This would seem to be the type of different operation that should fit into the Copyright Office's prediction in its *Zarya* decision. But the standard the Copyright Office has now set is "perfect consistency."[121] Even photographs taken in sequence may not come out with perfect consistency, but this does not prevent the photographer from gaining copyright protection in each image.

Without copyright protection, creators would continue to face problems dating back to the printing press. They could not prevent others from copying their works; anyone would be free to reproduce and exploit them to the authors' detriment. As in the 1700s, creators would be denied the sole opportunity to benefit economically from their own creations. Under the Copyright Office's new standards, others could not reproduce a *page* from *Zarya of the Dawn* onto everyday objects; however, it would be perfectly acceptable to print the AI-generated illustration alone or even create sequels using the same images and make a profit to Ms. Kashtanova's detriment.

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114. *Id.* at 19.

115. *Id.* at 18.

116. *See infra* Part IV.

117. Interestingly, a human user's tangible, written prompts would be more capable of verification than any "selection and arrangement" a user claimed over a compilation of AI-generated elements.

118. 2025 REPORT, *supra* note 8, at 16.

119. *Id.* at 6.

120. *Id.* at 7.

121. *Id.*

In modern times, those without access to vast resources and costly equipment may have easy access to generative AI apps. Placing absolute limits on the tools creators use could preclude entire groups of people who may rely on such accessible tools to create. This certainly does not "encourage" creation but, instead, undermines the entire purpose of copyright and its protections.

IV: DEVELOPING THE BIG PICTURE

Certainly, AI is not human. But there are other things that AI is not. AI is not freethinking. It relies on programmers and human users to shape its capabilities. Unlike the Copyright Office's hypothetical artist for hire, AI tools cannot apply their own subjective interpretation to a user's instructions. The only "thought" behind an AI-generated work is that of a human who feeds AI creative visions via prompts.[122] AI is also not a "'person' who was 'the cause of the picture which is produced'" or the one who generates the idea behind a work.[123] Some commenters worried that protecting AI-generated works would "discourage human authorship."[124] But AI generates a work only when a *human* user asks it to do so. Using the Copyright Office's previous decisions and taking cues from other areas of intellectual property law, this Part sets out a process by which the Copyright Office may recognize human contributions and protect creative works conceptualized by human users and merely processed by AI tools.[125]

A. Negative Application

Where no human claims authorship or creative input in a work, those copyright applications would merit a quick dismissal by the Copyright Office. In cases such as Thaler's, where an application names a computer as the author of an "autonomously" generated work, there is clearly no human input to satisfy the authorship requirement. These situations would be comparable to that in *Naruto*—no human means no authorship and, therefore, no copyright.[126] However, if human authorship is claimed on an application,

122. The Copyright Office declares prompts a "common type of input" into AI systems that communicates the desired features of the output. *Id.* at 5.

123. Thaler Letter, *supra* note 74, at 4 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56 (1884)).

124. 2025 REPORT, *supra* note 8, at 34.

125. This article is limited to U.S. copyright and acknowledges that foreign governments are formulating their own responses to the use of AI technology. Some of the approaches are summarized in the Report. *See id.* at 28-31. At least three jurisdictions consider prompts in determining copyrightability. *See id.* at 28-30.

126. Naruto v. Slater, 888 F.3d 418, 420, 426 (9th Cir. 2018).

the next step will be establishing a sufficient amount of human control over the AI output to merit protection.

B. Human Provenance

The U.S. Patent and Trademark Office ("USPTO") has attempted to provide clarity on the amount of human contribution necessary to patent AI-assisted inventions. Just as copyright cases impressed that authors must be human, patent decisions have held that "only a natural person can be an inventor, so AI cannot be."[127] But unlike the Copyright Office, the USPTO does not deem AI assistance to preclude the patentability of even the AI-generated parts of an invention.

On February 13, 2024, the USPTO issued its own guidance in relation to AI-assisted inventions.[128] Recognizing the need to adapt as generative AI takes on a "greater role in the innovation process," the USPTO's guidance seeks to provide "clarification and consistency" in analyzing AI-assisted inventions.[129] Patents, like copyright, serve to "incentivize and reward human ingenuity."[130] Focusing the inventorship analysis on "human contributions," rather than those of an AI tool, will perpetuate this purpose by protecting inventions where such human contributions are "significant."[131]

In analyzing patent applications, the inquiry focuses primarily on contributions to "conception"—the "mental act" of invention.[132] According to the USPTO, the courts are "unwilling" to attribute conception to "non-natural persons."[133] At least one natural person must be found to have made a "significant contribution" to an AI-assisted invention by satisfying three factors.[134] To help analyze the factors in this context, the USPTO provided "guiding principles."[135] Importantly, the use of AI as an inventive tool "does

127. Thaler v. Vidal, 43 F.4th 1207, 1213 (Fed. Cir. 2022).

128. Inventorship Guidance for AI-Assisted Inventions, 89 Fed. Reg. 10043, 10043 (Feb. 13, 2024) [hereinafter USPTO Guidance]. This guidance does not "have the force and effect of the law" but serves as a framework for reviewing patent applications. *Id.* at 10045.

129. *Id.* at 10044, 10045.

130. *Id.* at 10044.

131. *Id.* at 10046-47.

132. *Id.* at 10046.

133. *Id.*

134. *Id.* at 10045, 10047. These *Pannu* factors analyze whether: 1) a named inventor contributed in "some significant manner to the conception or reduction to practice of the invention;" 2) the contribution was "not insignificant" when compared to the final invention as a whole; and 3) the contribution was not a mere explanation of "well-known concepts and/or the current state of the art." *Id.* at 10047 (quoting Pannu v. Iolab Corp., 155 F.3d 1344, 1651 (Fed. Cir. 1998)).

135. *Id.* at 10048.

not negate" any human contribution to an invention.[136] Showing that an AI-user's prompt is an "essential building block" or is created "in view of a specific problem to elicit a particular solution" may satisfy the significant contribution requirement.[137] Altering or performing "successful experiment[s]" on AI-generated output may qualify as a significant contribution.[138] Noticeably missing from the USPTO's guidance is the Copyright Office's requirement to disclaim any AI-assisted portions on an application. In fact, the USPTO urges that applicants "must not" indicate a non-natural person regardless of whether AI or any other tool "may have been instrumental" in an invention's creation.[139] Disclosing AI assistance is required only if it is grounds for unpatentability because AI was actually responsible for a human's claimed contribution.[140] But, where enough human contribution is established, the entire invention is entitled to patent protection. This approach "strikes the right balance" between incentivizing creation and "not hindering" future innovation.[141]

The Copyright Office should analyze copyright registration applications through the same lens. Two of the three copyright applicants in Part III did not attribute their works to non-human entities, such as computers, spirits, or monkeys. These human applicants listed themselves as the authors. AI was merely an assistive tool they used in their original creations. Some element of human creativity occurred. These works were not created by natural forces like a garden;[142] they did not originate with celestial beings. The underlying ideas were conceived by human minds, a product of a human's "idea, fancy, or imagination."[143] But, according to the Copyright Office, they just did not cut it.

Comparing the prompts used to generate *Zarya*, asking AI to "draw a picture of an orange cat" is undoubtedly too generic to establish creative input by a human – much like "holographic elderly white woman."[144] Prompts of this nature would certainly "convey unprotectible ideas."[145] But

136. *Id.*

137. *Id.* at 10048, 10049.

138. *Id.*

139. *Id.* at 10046.

140. *Id.* at 10049. Similar to Copyright Office procedures, the USPTO may request additional information on inventorship where they have reason to believe a named inventor may not have provided a "significant contribution." *See id.* at 10050.

141. *Id.* at 10047.

142. *See* Kelley v. Chicago Park Dist., 685 F.3d 290, 304 (7th Cir. 2011) (finding the plaintiff did not author a living work of art in the form of a garden because the "colors, shapes, textures, and scents of the plants" were products of nature and not "the mind of the gardener").

143. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884).

144. Zarya Letter, *supra* note 85, at 10.

145. 2025 REPORT, *supra* note 8, at 18.

what if a user delved deeper than this "big picture description" and prompted AI to generate a "watercolor painting of a rusty orange tomcat with white stripes, green eyes, and unusually long whiskers stretched out on a balcony, the sun high in the sky behind him as he watches the local pigeons' shadows dance along main street, ears twitching in time as he ponders whether his next move is that of a good kitty or a bad kitty"? A detailed prompt such as this would account for the traditional elements of authorship for both literary works (plot, characters, and theme) and photographs (pose, backdrop, lighting, and expression). Arguably, the generated cat would not be "utterly lacking" any "creative spark." Nor is its generation a "mere mechanical process" operating "randomly or automatically without any . . . intervention from a human author." The sole cause of its creation is a human user's prompts, meant to "elicit a particular" output based on a user's "original mental conception."[146]

The Copyright Office views the machine as "executing" these instructions and creating the resultant expression, which is seemingly why the Office equates AI to the hired artist who ultimately authors any output. The user, it believes, merely "commission[s]" the work and "provide[s] detailed suggestions and directions," and so has not provided sufficient contributions to be considered an author.[147] Although "execute" can mean "to make or produce" something, another definition is "to cause a system to perform indicated tasks."[148] Because AI systems *produce* output based on human input, the Copyright Office insists any product can only be the machine's creation.[149] But the Copyright Office's guidance has not formally adopted the former (or any) definition of "execute." In fact, the *Burrow-Giles* court invoked language from the Queen's Bench in the 1883 case of *Nottage v. Jackson* that tends to support the latter definition.[150] In deciding whether a photographer can be an author of a photograph, the court deemed the author to be "the person who effectively is as near as he can be the *cause* of the picture which is produced," focusing on the photograph's cause of creation rather than the camera's production of it.[151] Looking at AI as an assistive tool, human users enter prompts that *cause* AI to perform the tasks

146. The Copyright Office acknowledges that "some" commenters consider "highly detailed prompts as sufficient" to establish copyrightability, including outputs that "'reflect[]" a user's "original conception of the work." *Id.* at 14-15.

147. Id. at 9 (discussing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)).

148. *Execute*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/execute (last updated Mar. 7, 2025).

149. Copyright Registration Guidance, 88 Fed. Reg. at 16192.

150. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60-61 (1884).

151. *Id.* at 61 (quoting Nottage v. Jackson, (1883) 11 QBD 627 (Eng.)) (emphasis added).

indicated and produce the "intellectual invention"[152] of the user. Just like a shutterbug's click.

For AI-generated creative works, where a user's prompts are specific enough to make a human the "master mind"[153] behind the work's traditional elements of authorship—thus satisfying the initial criteria set out by the Copyright Office—the work will then move into a third phase that seeks to reduce the risk of registering infringing works.

C. Calibration

Because AI systems are trained using pre-existing data, AI critics fear pre-existing elements or works will appear in newly-generated AI creations.[154] As set out in Part II, the risk of this is extremely low,[155] but a risk still exists. Incorporating opportunities to oppose copyright registrations for AI-generated works, borrowed from the USPTO's trademark and patent processes, would help alleviate concerns that infringing AI works could be registered and conflict with others' rights.

When the USPTO determines a trademark "applicant is entitled to registration," a potential mark is published in the USPTO's *Official Gazette*.[156] For thirty days, any member of the public who believes he or she "would be damaged by the registration of a mark" has the opportunity to oppose a mark's registration.[157] Although this language "establishes a broad class of persons" with standing to oppose, potential opposers also face "two judicially-created requirements."[158] First, an opposer must have a "direct and personal stake" in a proceeding, acting as more than a "mere intermeddler."[159] Second, an opposer must hold a "reasonable basis" to believe he or she may be damaged.[160]

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152. *Id.* at 60.

153. *Id.* at 61.

154. *See* Bernard Marr, *The Intersection of AI and Human: Can Machines Really Be Creative?,* FORBES (Mar. 27, 2023, 2:48 AM), https://www.forbes.com/sites/bernardmarr/2023/03/27/the-intersection-of-ai-and-human-creativity-can-machines-really-be-creative; Gil Appel et al., *Generative AI Has an Intellectual Property Problem,* HARV. BUS. REV. (Apr. 7, 2023), https://hbr.org/2023/04/generative-ai-has-an-intellectual-property-problem; Angela Yang, *More Than 11,000 Creatives Condemn Unauthorized Use of Content for AI Development,* NBC NEWS (Apr. 3, 2023), https://www.nbcnews.com/tech/actors-artists-authors-open-letter-ai-copyright-rcna176681.

155. *See supra* Part II.

156. 15 U.S.C. § 1062(a).

157. *Id.* § 1063(a). The opposition period may be extended for additional thirty-day periods upon request and for good cause. *Id.*

158. Ritchie v. Simpson, 170 F.3d 1092, 1095 (Fed. Cir. 1999).

159. *Id.*

160. *Id.*

In 2017, DC Comics ("DC") successfully opposed registration of the mark "Super Woman of Real Estate," alleging trademark violations of likelihood of confusion with and dilution of DC's common law and registered Superman, Superwoman, and Supergirl marks.[161] An advertisement for the realtor seeking registration included a photo of her in a blue bodysuit with a red cape and a red and yellow "SW" symbol "inside a five-sided shield on the chest."[162] In a non-precedential decision, the Trademark Trial and Appeals Board held that these details were "extremely similar" to DC's and, due to this similarity, the realtor's mark was likely to dilute the Superman mark.[163] Ultimately, the realtor's registration was refused.[164] In contrast, if a proposed mark survives the opposition period, the mark is "entitled to registration."[165]

Similarly, the USPTO allows patents to be opposed pre-issuance[166] or within nine months of being issued.[167] This allows a non-owner to submit information that may be relevant to the USPTO's patentability determination[168] or request a review of a patent where there may be reason to believe an invention is unpatentable.[169] One such cause of unpatentability is that an invention is not "new."[170] A successful opposition results in a patent's cancellation.[171]

Providing similar opposition periods in the copyright process would help to alleviate the concern that AI-generated works would infringe on others' pre-existing copyrights. Copyright holders would have a direct and personal interest in opposition proceedings against infringing works, satisfying the first prong of the test.[172] Where a newly generated AI work is "extremely similar" to or inclusive of a pre-existing work, an existing copyright holder would have a reasonable basis to believe he or she would suffer damage

161. DC Comics v. Rivetti, No. 91219851, 2017 WL 3670303 at *1, *9 (T.T.A.B. 2017).
162. *Id.* at *7, *9.
163. *Id.* at *9.
164. *Id.* at *10.
165. 15 U.S.C. § 1063(b)(1).
166. 35 U.S.C. § 122(e).
167. *Id.* § 321.
168. *Id.* § 122(e).
169. *Id.* § 321.
170. *Id.* § 101 (requiring inventions or discoveries to be "new").
171. *Id.* § 321.
172. Copyright holders are in a position similar to that of DC, the registered owner of the Superman and Superwoman marks, who felt their marks would be diluted by allowing registration of "Superwoman of Real Estate." *See* DC Comics v. Rivetti, No. 91219851, 2017 WL 3670303 at *1 (T.T.A.B. 2017).

should copyright protection be granted to that work.[173] Following in DC's footsteps, these copyright holders could oppose the registration of potentially infringing works and protect their exclusive rights under copyright.

The opposition period would also advantage other AI users. Once an AI-generated work has been copyrighted, subsequent works that may have used similar prompts and generated similar output could potentially infringe on existing copyrights. Creators could browse the works published in the *Gazette* to become aware of works that have already merited protection.[174] Although copyright allows for independent creation of similar works by different creators, pre-emptively opposing infringing works during this period would alleviate future infringement battles.

D. Final Filter

If an AI-generated work successfully completes both the creative narrative and opposition phases, it would then enter a third and final phase: the Copyright Office's standard review process. The Copyright Office's Review Board could consider all the facts and circumstances when making copyrightability determinations. The works would remain subject to all the standard limitations of copyright, such as work category, originality, and fixation, but their creators would have the potential to gain all the benefits. Rather than a blanket denial of any works generated with the assistance of AI, some new, original, and creative works would be copyrightable and protectible by creators. Once protected, creators' "monopolies" would be subject to the same limitations such as fair use and compulsory licenses.

Under this proposed standard, the illustrations from *Zarya* could be eligible for protection alongside the other original elements of the book.[175] Ms. Kashtanova could prevent others from using these illustrations for their own benefit, either in their own comic books or in *Zarya* merchandise sold for profit. Artists like Mr. Allen, given the chance to decide where and when their art is used, could protect the integrity of their own prize-winning works of art.

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173. For example, in cases where, as in *DC Comics*, the proposed marks consisted of the same colors and shapes as DC's marks. *Id.* at *7.

174. This is similar to potential patent holders, who can search published patent applications to determine whether their inventions resemble prior inventions.

175. The Report rightly states that, under its standard, works are protectible "as a whole." 2025 REPORT, *supra* note 8, at 27. But this does not protect standalone elements of works, such as a character in a film, which are separately protectible. *See* DC Comics v. Towle, 802 F.3d 1012, 1023 (9th Cir. 2015) (declaring the Batmobile a protectible character). Just as third parties cannot legally exploit the Batmobile for their own gain, neither should they be able to legally exploit illustrations created by AI users such as Kashtanova.

Potential downsides would be outweighed by the benefits of protection. The initial phases would ensure minimal administrative burden on the Copyright Office by filtering out works that did not meet a minimum threshold of creativity or posed a real danger of infringement. Providing other AI users the opportunity to oppose potential copyrights would shift the burden of policing AI works from the Copyright Office to AI users themselves. Establishing criteria for human authorship would eliminate ambiguity as to rights, addressing ownership and enforcement issues prevalent in AI copyrightability discussions. First-time creators may be able to utilize a tool that is easily accessible and capable of assisting them in realizing their vision. Creators contributing to several industries—literature, music, film, and comic books, to name a few—would be encouraged to continue creating in new and progressive ways. To enrich society by disseminating their creations. To benefit us all in the long run.

V: ABSOLUTE RESOLUTION

The Report did nothing to cure the problem facing creators like Kashtanova. Her original illustrations are still subject to exploitation by others, without her permission, however, wherever, and whenever they alone see fit. "Since artistic works are part of an artist's very identity, she never should be completely separated from the work."[176]

Time and again, copyright law has evolved alongside technology, widening its scope to encompass new ways of creating and sharing expressive works. Concededly, nothing can replace the richness or emotion of a human voice or the human experience that inspires art. But allowing AI-generated works to benefit from copyright protection will continue to encourage creativity. Not just by those with the raw talent and resources to execute their own creative ideas, but by anyone who may have access to an AI-generative tool to help bring his or her ideas to fruition. The Copyright Office must reconsider its position on the copyrightability of works generated using AI to continue to adhere to its "mission" of promoting "creativity and free expression by . . . providing impartial, expert advice on . . . policy for the benefit of all."[177]

176. Kanu Priya, *Intellectual Property and Hegelian Justification*, N.U.J.S. L. REV., 359, 360, 363 (2008) (discussing Hegel's widely-adopted view that property, and in particular intellectual property, is "an extension of personality").

177. 2025 REPORT, *supra* note 8, "About the U.S. Copyright Office."