HUMAN WRITER VERSUS MACHINE: THE IMPLICATIONS OF ARTIFICIAL INTELLIGENCE IN HOLLYWOOD AFTER THE 2023 WGA STRIKE

Miranda DePalma[*]

I. INTRODUCTION

Fade in. It's the summer. The sun beats down on you as you stand on the sidewalk outside a studio. You hold a slogan on a stick in your hands. Your feet move forward. For hours, you stand or walk in a line, up and down the sidewalk, surrounded by your fellow writers. You chant words like "Fists up, Pens down;"[1] words you believe in. You hope someone listens. However, as you arrive that day on the sidewalk, you start to question, When will this end? When will I get back to work? You walk and chant, but you do so with no job and no income. You cannot predict what your job will look like at the end of this sidewalk. You hope you have a job at all.

That was the reality for the picketing writers, actors, and automotive workers in the summer of 2023, dubbed "Hot Labor Summer."[2] Although a new deal has been ratified, these agreements between the Writers Guild of America ("WGA") and the Alliance of Motion Pictures and Television Producers ("AMPTP") expire every three years.[3] During this particular

---

[*] J.D., Southwestern Law School, 2024. I'd like to thank the writers, actors, and union employees who were standing outside for hours in the hot sun during the 2023 strikes. If not for their efforts and dedication, this note would not exist.

1. *Strike Chants 2023*, WGA CONTRACT 2023, https://www.wgacontract2023.org/strike/strike-chants-2023 (last visited Dec. 26, 2023).

2. *See* Soumya Karlamangla, *California's Hot Labor Summer Is Not Over Yet*, NY TIMES (Sept. 5, 2023), https://www.nytimes.com/2023/09/05/us/california-unions-kaiser-permanente.html; E. Tammy Kim and Tyler Foggatt, *The Historic Battles of "Hot Labor Summer"*, THE NEW YORKER (July 27, 2023), https://www.newyorker.com/podcast/political-scene/the-historic-battles-of-hot-labor-summer.

3. MEMORANDUM OF AGREEMENT FOR THE 2023 WGA THEATRICAL AND TELEVISION BASIC AGREEMENT 1 (Sept. 25, 2023), https://www.wgacontract2023.org/wgacontract/files/memorandum-of-agreement-for-the-2023-wga-theatrical-and-television-basic-agreement.pdf.

cycle, the WGA sought gains in issues related to compensation, working conditions, and new technology, namely artificial intelligence.[4] This Note focuses on the artificial intelligence issue that will return after three years of technological progress and again threaten the livelihoods of all WGA members.

In the beginning, artificial intelligence became a sticking point in negotiations when the AMPTP made the issue a non-starter.[5] The incitement of the WGA members over residuals and artificial intelligence fueled the strike for nearly five months,[6] hoping their jobs would be waiting for them at the end. The artificial intelligence issue became the boogieman in the closet for writers, who believed studios sought to reduce a screenwriter's role in the development process.[7]

Although artificial intelligence looms over a writer's livelihood, the Copyright Act of 1976 currently stipulates that "original works of authorship fixed in any tangible medium of expression" are entitled to copyright protection.[8] Judicial opinions through the years, even before the 1976 Act, support the requirement of a *human* author rather than a computer program or even a monkey.[9] In August 2023, the United States District Court for the District of Columbia found human authorship to be a "bedrock requirement of copyright," when determining if an artificially generated painting received copyright protection.[10] Additionally, the Copyright Office enforces the human authorship requirement on works containing AI-generated materials.[11] With the law and Copyright Office in agreement, entertainment studios pushing to use artificial intelligence

4. *See generally* WGA NEGOTIATIONS—TENTATIVE AGREEMENT 1 (Sept. 25, 2023), https://www.wgacontract2023.org/wgacontract/files/wga-negotiations-tentative-agreement.pdf (including the WGA proposals on several issues including those relevant to this paper such as compensation, working conditions, and artificial intelligence).

5. Mandalit del Barco, *Striking Movie and TV Writers Worry That They Will be Replaced by AI*, NPR (May 20, 2023, 5:17PM ET), https://www.npr.org/2023/05/20/1177366800/striking-movie-and-tv-writers-worry-that-they-will-be-replaced-by-ai.

6. *See* WGA NEGOTIATIONS—TENTATIVE AGREEMENT, *supra* note 4. (The initial WGA proposals are from May 1, 2023, and the tentative deal was offered September 25, 2023).

7. Gene Maddaus, *How the WGA Decided to Harness—but Not Ban—Artificial Intelligence*, VARIETY (May 23, 2023, 7:48 AM PT), https://variety.com/2023/biz/news/wga-ai-writers-strike-technology-ban-1235610076/.

8. 17 U.S.C. § 102(a).

9. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991); Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018).

10. Thaler v. Perlmutter, 687 F. Supp. 3d 140 (D.D.C. 2023).

11. *See* 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), https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf.

should think twice if they want original works by artificial intelligence to be copyright-protected.

This Note will address the legality of using artificial intelligence systems to generate scripts and warns that entertainment studios may not legally enforce any exclusive rights in copyright if they remove the human authorship requirement. Part II.A briefly explores generative artificial intelligence and highlights its continued growth, and it illustrates the copyright requirements for a work—specifically the human authorship requirement for originality—through its evolution in case law. Part II.B also highlights the Copyright Office's guidelines for generative artificial intelligence and exemplifies those guidelines through registration denials, including the D.C. District Court's denial of copyright protection in *Thaler*. Part III examines the WGA strike proposal concerning generative artificial intelligence and emphasizes how the studios' seemingly intended use for artificial intelligence likely is not sustainable under the Copyright Act. Part IV explores Daniel J. Gervais's article on machine-produced works and the public domain,[12] and demonstrates the potential harm to a studio's profitability if it utilizes artificial intelligence to write scripts. Finally, this Note concludes that entertainment studios only hurt themselves if they attempt to exclude human authorship from work intended to be copyright-protected. Essentially, studios need writers more than writers need studios.

II. BACKGROUND

Copyright protection requires a work to be original to the author and fixed in a tangible form of expression.[13] Without the basic requirements of copyright, an author of a work cannot enforce the six exclusive rights of copyright, including registering the work with the Copyright Office and claiming copyright infringement in court.[14] As technology develops, the requirements of copyright become harder to determine, such as in works including artificial intelligence.

A. Generative Artificial Intelligence

In many professional fields, artificial intelligence could be a beneficial tool. During the summer of 2023, generative artificial intelligence ("GAI") became a negotiated proposal for the guilds.[15] According to IBM, a global

12. Daniel J. Gervais, *The Machine as Author*, 105 IOWA L. REV. 2053, 2064 (2019).

13. 17 U.S.C. § 102(a).

14. 17 U.S.C. § 412.

15. *See, e.g.*, *WGA on Strike*, WGA CONTRACT 2023 (May 1, 2023), https://www.wgacontract2023.org/announcements/wga-on-strike; Press Release, Screen Actors

innovator and leader in artificial intelligence advances, GAI utilizes neural networks to process data, identify patterns, and create new content, such as images or speech.[16] By inputting a prompt, artificial intelligence can generate any request—a painting, a poem, or a script, as explained by IBM.[17] With GAI continuing to grow its information database, IBM foresees the technology continuing to grow in capability with newer models training on bigger datasets,[18] potentially incorporating copyrighted materials without consent.[19] Although artificial intelligence can be a useful tool, there are copyrightability issues as well as potential copyright infringement by any works created with this particular tool.

B. Evolution of Human Authorship

When involving artificial intelligence in a work, the required element at issue is original works of authorship. Specifically, the issue arises with the lack of *human* authorship, as exemplified by copyright registration applications being denied.[20] When reviewing applications, the Copyright Office looks to judicial precedent to further interpret the element of original authorship. First, *Burrow Giles Lithographic Co. v. Sarony* laid a foundation, and subsequent cases expanded on the case's interpretation of the original human authorship requirement.

1. Burrow-Giles Lithographic Co. v. Sarony

In 1884, the United States Supreme Court ruled on a case involving an Oscar Wilde photograph and reproductions of the portrait infringing on the

---

Guild, SAG-AFTRA Negotiations Status as of July 13, 2023 (July 17, 2023), https://www.sagaftra.org/files/sa_documents/SAG-AFTRA_Negotiations_Status_7_13_23.pdf.

16. *What Is a Neural Networks?,* IBM, https://www.ibm.com/topics/neural-networks (last visited Dec. 26, 2023).

17. *What Is Generative AI?*, IBM, https://research.ibm.com/blog/what-is-generative-AI (last visited Dec. 26, 2023).

18. *Id.*

19. *Id.*; *see, e.g.*, Class Action Complaint at 2, Authors Guild v. OpenAI, Inc., No. 1:23-cv-8292 (S.D.N.Y., Sept. 19, 2023); Demand for Jury Trial at 8, Getty Images, Inc. v. Stability AI, Inc., No. 1:23-cv-00135-UNA (D. Del., Feb. 3, 2023); Complaint at 4-5, Silverman v. OpenAI, Inc., No. 3:23-cv-03416 (N.D. Cal. 2023).

20. *See, e.g.,* Letter from Robert J. Kasunic, Assoc. Reg. Copyrights & Dir. Office of Regis. Pol'y & Prac., U.S. Copyright Off., to Van Lindberg, Esq., Taylor English Duma LLP (Feb. 21, 2023), https://www.copyright.gov/docs/zarya-of-the-dawn.pdf; Letter from Shira Perlmutter, Reg. Copyrights, U.S. Copyright Off. Rev. Bd., to Ryan Abbott, Esq., Brown, Neri, Smith & Khan, LLP (Feb 14, 2022), https://copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf; Letter from Susanne V. Wilson, Gen. Couns. & Assoc. Reg. Copyrights, U.S. Copyright Off. Rev. Bd., to Tamara Pester, Esq., Tamara S. Pester, LLC (Sept. 5, 2023), https://copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf.

photographer's copyright.[21] Leaning on the U.S. Constitution, Article 1, Section 8, the Court determined that the original Oscar Wilde photograph had sufficient original, intellectual conception to enforce a claim of copyright infringement.[22] Under a *Burrow-Giles* analysis, an author must originate, make, produce, invent, pose, or arrange the subject in front of the camera to claim the work as an original work of human authorship.[23] As presented in the following cases, this foundational ruling continues to be cited a hundred years later.[24] Today, *Burrow-Giles* remains the definitive standard where a work has questionable original authorship.

2. Feist Publishing, Inc. v. Rural Telephone Service Co.

Over a hundred years later, the United States Supreme Court reinforced the *Burrow-Giles* ruling in a case about telephone directories.[25] When examining the content, the Court reiterated a fundamental principle of copyright: facts are not copyrightable.[26] However, a compilation of facts may be copyrightable.[27] In *Feist*, the Court recalled *Burrow-Giles*'s interpretation of original authorship, emphasizing a need for "original intellectual conceptions of the author" in obtaining copyright and proving infringement.[28] Where the selection of directory information lacked a "modicum of creativity,"[29] the court held that copyright only extends to the "components of a work that are original to the author,"[30] including the arrangement of facts.[31] Reasoning that only original human choices are copyrightable,[32] *Feist* joins *Burrow-Giles* in defending a *human* authorship requirement.

3. Naruto v. Slater

When you give a monkey a cell phone, of course, he takes a selfie. In 2018, the Ninth Circuit ruled on who or what group could bring a claim of

21. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).
22. *Id.* at 56, 60.
23. *Id.* at 60.
24. *See, e.g.,* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991); Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018); Thaler v. Perlmutter, 687 F. Supp. 3d 140, 144 (D.D.C. 2023). .
25. *See Feist*, 499 U.S. 340.
26. *Id.* at 344.
27. *Id.*
28. *Id.* at 346-47 (quoting *Burrow-Giles Lithographic Co.*, 111 U.S. at 59-60).
29. *Id.* at 362.
30. *Id.* at 348, 363.
31. *Id.* at 348.
32. *Id.* at 348, 363-64.

copyright infringement over a monkey's selfie.[33] Under a standing analysis, the court indirectly examined whether the Copyright Act intended to provide standing for claimants other than humans in copyright infringement claims.[34] The Copyright Act's use of "author," "children," and "grandchildren" implies a necessity of humans to generate copyrightable works.[35] Thus, although a monkey may physically take a selfie, no human was involved in the action outside of the contribution of a cell phone with a camera.[36] Without human contribution, a potentially copyrightable work may fail to provide any legal rights for non-humans or humans.

C. Copyright Office Registration Requirements

In addition to case law, the Copyright Office also announced its stance on works created by non-human entities, specifically artificial intelligence. In the announcement, the Copyright Office emphasizes a right to deny copyright registration if the work is not substantially authored by a human.[37] When registrations include work generated by artificial intelligence, the Copyright Office offered guidance in the March 2023 announcement and enforced that stance in a string of registration denials.

1. Copyright Office Guidelines on Artificial Intelligence

As a federal body, the Copyright Office may dictate information required in a registration application enumerated by the Copyright Act, allowing the institution to modify or expand as new technology emerges.[38] On March 16, 2023, the Copyright Office issued an announcement on registration applications, including works generated by artificial intelligence.[39] The announcement reiterates the idea already established in judicial decisions: the term "author" excludes non-human entities, such as artificial intelligence, that may merely mimic human artwork.[40] Thus, the Copyright Office will determine whether the AI contributions are "mechanical reproductions" or the author's "own original mental conception."[41] Despite this question being a case-by-case analysis, a work

33. *See* Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018).
34. *Id.* at 425-26.
35. 17 U.S.C. § 203(a)(2)(A-D); *see also Naruto*, 888 F.3d at 426.
36. *Naruto*, 888 F.3d at 420.
37. Copyright Registration Guidance, 88 Fed. Reg. 16192 (Mar. 13, 2023).
38. *Id.* at 16190-91.
39. *See id.*
40. *Id.* at 16191.
41. *Id.* at 16192 (citing Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884)).

will lack human authorship if its elements of authorship, such as the expressive elements, are produced by a machine rather than a human.[42] However, copyright protection is still possible, even with AI-generated material. By arranging or modifying AI-generated material in a sufficiently creative way, the final product may be entitled to copyright protection under a *Feist* analysis.[43] While artificial intelligence may be used as a tool to create the work, copyright will only protect the human-authored aspects of a work.[44] This guidance continues to be exemplified in recent copyright registration denials.

2. Works Created by Artificial Intelligence Denied Registration

Before March 2023, the Copyright Office denied several works containing elements created by non-human entities.[45] Now, registration denials follow the Copyright Office's clear guidance by only protecting human-authored aspects.[46]

Initially submitting a registration application in September 2022, Kristina Kashtanova claimed authorship of a comic book titled *Zarya of the Dawn*.[47] On the application, Kashtanova did not disclose the assistance of artificial intelligence.[48] Even though Kashtanova claimed authorship of the work, stating that the AI program Midjourney was an assistive tool, the Copyright Office determined that the individual images generated by artificial intelligence were not protected by copyright.[49] Despite the text and the arrangement of the images being authored by a human, the Copyright Office decided Kashtanova did not create the final visuals herself when using an unpredictable, "trial-and-error" prompt method to generate the images with Midjourney.[50] Using *Burrow-Giles* as the foundation for

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

43. *Id.*; *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991); 17 U.S.C. § 101 ("A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.").

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

45. *See, e.g.*, Letter from Robert J. Kasunic to Van Lindberg, Esq., *supra* note 20; Letter from Shira Perlmutter to Ryan Abbott, Esq., *supra* note 20; Letter from Susanne V. Wilson to Tamara Pester, Esq., *supra* note 20.

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

47. Letter from Robert J. Kasunic to Van Lindberg, Esq., *supra* note 20, at 1-2.

48. *Id.* at 2.

49. *Id.* at 3, 8.

50. *Id.* at 4-5, 8-9. (noting that only the text and arrangement of images would be copyrightable).

its reasoning, the Copyright Office refused to grant copyright protection to the images generated by artificial intelligence.[51]

After several applications and denials, Stephen Thaler challenged his registration denial in court.[52] In *Thaler v. Perlmutter*, the district court discussed whether a painting could receive copyright protection when created by a non-human entity, namely artificial intelligence.[53] When initially submitting the artwork "A Recent Entrance to Paradise" for registration, Thaler did not claim authorship.[54] Instead, the author included on the application was identified as "Creativity Machine," of which Thaler claimed ownership of Creativity Machine.[55] Under a "work-for-hire" basis, Thaler claimed copyright ownership of the artwork.[56] However, the Copyright Office found Thaler's arguments uncompelling, affirming the original denial of copyright for the artwork.[57] Citing *Burrow-Giles*, the court emphasized that United States copyright law *only* extends to works of human authorship, stating that "[h]uman authorship is a bedrock requirement of copyright."[58] In rejecting Thaler's challenge to his registration denial, the court refused to change the understanding that copyright requires a human author.[59] Considering the Copyright Act's language and relevant case law, Thaler's AI-generated work was never eligible for copyright protection when he applied for registration.[60]

In September 2023, the Copyright Office once again refused protection for an artwork generated by artificial intelligence.[61] Similar to Kashtanova's comic book, Jason M. Allen failed to disclose that his artwork "Théatre D'opéra Spatial" was created by artificial intelligence.[62] However, unlike the comic book, Allen's artwork gained national attention as the first AI-generated image to win a Colorado State Fair fine art competition in 2022, making the Copyright Office aware of the true creator.[63] Also using the artificial intelligence system, Midjourney, Allen prompted the system

51. *Id.* at 3, 9, 12.

52. *See* Thaler v. Perlmutter, 687 F. Supp. 3d 140 (D.D.C. 2023).

53. *Id.*

54. Letter from Shira Perlmutter to Ryan Abbott, Esq., *supra* note 20, at 1-2; *see also Thaler*, 687 F. Supp. 3d at 143.

55. Letter from Shira Perlmutter to Ryan Abbott, Esq., *supra* note 20, at 2; *see also Thaler*, 687 F. Supp. 3d at 143.

56. Letter from Shira Perlmutter to Ryan Abbott, Esq., *supra* note 20, at 2.

57. *Id.* at 7.

58. *Thaler*, 687 F. Supp. 3d at 146.

59. *Id.* at 147.

60. *Id.* at 150.

61. Letter from Susanne V. Wilson to Tamara Pester, Esq., *supra* note 20, at 1.

62. *Id.* at 1-2.

63. *Id.* at 2.

624 times to get a final version of which Allen removed any flaws and refined the image's resolution in Adobe Photoshop and Gigapixel AI.[64] Because of the guidelines for AI-generated works established in March 2023,[65] the Copyright Office requested additional information on features generated by Midjourney, as they would not be subject to copyright protection.[66] Allen refused to provide that information, asserting his claim to copyright ownership of the entire work, including the AI-generated features.[67] Despite reconsideration of the claim after the initial rejection, the Copyright Office affirmed its denial, finding "an amount of AI-generated material that is more than *de minimis*."[68] The Office explained that imputing 624 prompts does not make Allen the author of the artwork when Midjourney had to interpret each one of those prompts to develop the artwork's final form.[69] Although works may receive copyright protection despite the assistance of artificial intelligence, the Copyright Office has not yet granted protection to aspects generated by artificial intelligence.

D. What Now, Artificial Intelligence?

After examining how generative artificial intelligence generally works, the judicial opinions illustrating the requirement of human authorship, and the Copyright Office's response to works created or assisted by artificial intelligence, the entertainment industry's desire to use generative artificial intelligence must be scrutinized more closely. In the context of the Writers Guild's contract negotiations, the following analysis explains what generative artificial intelligence looks like when used by entertainment studios and the legal implications of that usage under current copyright law.

III. HOLLYWOOD'S CRUMBLING AI FANTASY

In May 2023, the WGA went on strike against the AMPTP with proposals concerning viewership-based streaming residuals, duration of employment, and artificial intelligence.[70] In its initial proposal, the WGA desired regulation on artificial intelligence when used in projects covered by the Minimum Basic Agreement ("MBA").[71] In line with legal

64. *Id.*
65. *See* Copyright Registration Guidance, 88 Fed. Reg. 16190 (Mar. 13, 2023).
66. Letter from Susanne V. Wilson to Tamara Pester, Esq., *supra* note 20, at 2.
67. *Id.* at 2.
68. *Id.* at 5.
69. *Id.* at 6.
70. *See* WGA NEGOTIATIONS—TENTATIVE AGREEMENT, *supra* note 4.
71. *Id.* at 6.

precedent,[72] the WGA requested artificial intelligence not write or rewrite material nor be used as source material.[73] Further, the WGA sought to protect existing material from being used to train generative artificial intelligence systems.[74] In responding to these initial proposals, the AMPTP rejected the requests outright, countering with "annual meetings to discuss advancements in technology."[75] However, a discussion of technological advancements is not a solution that protects the underlying copyrighted material in an AI-generated work or prevents artificial intelligence from writing material without human choice.

Despite the AMPTP's initial resistance, the tentative agreement reached in September 2023 agreed to regulations on artificial intelligence.[76] Notably, the AMPTP conceded that "AI is not a writer" and AI-generated material is not considered literary material under the MBA.[77] This idea flows from the district court's decision in *Thaler.* Although writers can choose to use artificial intelligence when performing any writing services under this agreement, a signatory company cannot force a writer to use artificial intelligence and must disclose if any material given to the writer includes AI-generated material.[78] To not hinder compensation or writing credits, any material written by generative AI issued to the writer will not be considered assigned material or source materials.[79] The provisions of the tentative, and ultimately ratified, agreement illustrate the legal precedent that culminated in *Thaler*, a decision that came out just over a month before the offer of this final agreement.[80]

Similar to the *Thaler* court's holding, a work generated by artificial intelligence would not be eligible for copyright protection without some contribution by a human author under the ratified agreement.[81] The ratified agreement highlights the essential requirement of human authorship by placing regulations on what material can be considered literary material.[82]

---

72. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59-60 (1884); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 348 (1991); Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018).

73. WGA NEGOTIATIONS—TENTATIVE AGREEMENT, *supra* note 4, at 6.

74. *Id.* at 7.

75. *Id.* at 6.

76. MEMORANDUM OF AGREEMENT, *supra* note 3, at 69.

77. WGA NEGOTIATIONS—TENTATIVE AGREEMENT, *supra* note 4, at 6; *see also* MEMORANDUM OF AGREEMENT, *supra* note 3, at 68.

78. MEMORANDUM OF AGREEMENT, *supra* note 3, at 69.

79. *Id.*

80. *See generally Thaler*, 687 F. Supp. 3d 140 (D.D.C. 2023) (the decision came out August 18, 2023, while the AMPTP offered the tentative agreement on September 25, 2023).

81. *Id.* at 146-47.

82. MEMORANDUM OF AGREEMENT, *supra* note 3, at 68.

Thus, without human authorship in an artificially generated work, no AI-generated material would fall into the protected subject matter of copyright.[83] Accordingly, if a work is not protected by copyright, the owner of the work cannot enforce any exclusive rights granted by the Copyright Act, including reproduction, distribution, public performance, public display, and preparation of derivative works.[84]

Further, the ratified agreement follows the guidelines set out by the Copyright Office in March 2023.[85] With the AMPTP's concession on the status of artificial intelligence under the MBA, the agreement reflects the Copyright Office's March 2023 announcement by relegating AI-generated materials to non-literary materials and not considering artificial intelligence a writer.[86] Similar to the Copyright Office's allowance of AI-generated work under *Feist*,[87] the WGA agreement allows the use of artificial intelligence with clear consent and communication by the studio.[88] Thus, with support from *Thaler* and the Copyright Office, the AMPTP had little to bargain with against the WGA on artificial intelligence.

Copyright in the work will not persist without a human author. Instead, the work would immediately enter the public domain, allowing for non-copyright holders to exploit the AI-generated literary work without legal repercussions.[89] Therefore, although generative artificial intelligence is an attractive option, the complete lack of copyright protection harms the profitability of an AI-generated work when, instead, a studio could hire a human writer for complete protection.

IV. NOT SO FAST, HOLLYWOOD: MACHINE-GENERATED WORKS IN THE PUBLIC DOMAIN

In the article *The Machine as Author*, Daniel J. Gervais took a different stance than other articles on the copyrightability of AI-generated works: machine-produced works are not protected by copyright when a machine is no longer a tool of the artist or the work does not reflect its human-made

83. 17 U.S.C. § 102(a)(1)–(8), (b).

84. 17 U.S.C. § 106(1)–(5).

85. *See* Copyright Registration Guidance, 88 Fed. Reg. 16190 (Mar. 16, 2023).

86. WGA NEGOTIATIONS—TENTATIVE AGREEMENT, *supra* note 4, at 6.

87. Copyright Registration Guidance, 88 Fed. Reg. at 16192; *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991); 17 U.S.C. § 101 ("A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.").

88. MEMORANDUM OF AGREEMENT, *supra* note 3, at 69.

89. 17 U.S.C. § 102 (a), (b).

program.[90] While Gervais's article also argues for copyright protection of machine-produced works, the article concludes against copyright protection, highlighting the idea that machine-produced works would be immediately considered as part of the public domain.[91] After examining the history of authorship and the humanness inherent in preserving authorship, Gervais surmised that a human author continues to be central to copyright protection.[92] Instead of discussing who is the "author" of autonomous, machine creation, the article delves into the requirement of originality and the argument of derivative works' applicability to machine-produced works.[93] The article emphasizes that a machine cannot just "pass off" a generated work as creative because the process itself "must be human."[94] Copyright was designed to provide incentives for humans to engage with the creative process, but machines cannot make creative decisions because machines are preprogrammed by software potentially dictated by efficiency rather than creativity.[95] The production of new materials is not necessarily the production of creative choices as defined under *Feist*.[96]

If machine-generated works must have sufficient creativity to be eligible for copyright protection, Gervais asks what happens when a machine reaches this "threshold of autonomy" that departs from human authorship.[97] Gervais's argument is the foundation of this Note. The "threshold of autonomy" is the ability to make choices derived from information by the human creator.[98] By crossing that "threshold of autonomy," a material produced by the autonomous machine will enter the public domain where no copyrights vest in an author.[99] The article proposes a test to separate the creative human expression in a work from the non-protectable elements created by machines.[100] By looking at each work individually under his originality causation test, Gervais argues that a court should separate the creative choices made by human programmers or users from autonomous, unpredictable choices made by the machine.[101] If only autonomous, unpredictable machine choices exist, the produced work

90. Gervais, *supra* note 12, at 2062.
91. *Id.* at 2064.
92. *Id.* at 2085.
93. *Id.* at 2088.
94. *Id.* at 2093.
95. *Id.* at 2093-94; *see also* U.S. CONST. art. I, § 8, cl. 8.
96. Gervais, *supra* note 12, at 2093.
97. *Id.* at 2098.
98. *Id.*
99. *Id.* at 2099.
100. *Id.* at 2099-100.
101. *Id.*

will be "beyond the autonomy threshold," not creative, and not entitled to copyright protection.[102] Similarly, if choices by a human and machine jointly create a work, the machine's decisions should be treated like public domain materials and filtered out, only issuing copyright protection to original creative human choices.[103] Thus, Gervais's originality causation test treats machine-produced materials devoid of originality as public domain materials, so a machine-produced work with minimal or no creative human choice will not be granted copyright protection.[104]

Notably, Gervais's test is similar to the substantial similarity test, or the abstraction-filtration-comparison test developed for computer programs in *Computer Associates International, Inc. v. Altai, Inc*.[105] In 1992, the *Altai* court developed a three-step procedure to determine the substantial similarity of non-literal elements of computer programs.[106] Under this test, a court breaks down the infringed program into its structural parts, filters out unprotected elements, and compares the remaining copyrightable elements to the infringing work.[107] Unprotected elements would include incorporated ideas (limited ways of expression), expressions incidental to those ideas (*scenes a faire*), and public domain elements.[108] With courts already applying a similar test, Gervais's test seemingly extends the abstraction-filtration-comparison test to artificially created materials.

In applying Gervais's argument to the 2023 WGA Strike, where writers fought to keep generative artificial intelligence from being labeled as a writer, the separation of the AI-generated portions of a script allows individuals to freely use those AI portions in future creative endeavors as if the material is reused public domain material. Although a studio may claim the AI-generated script was made on a "work for hire" basis, the *Thaler* court already rejected that argument.[109] Without copyright protection, the work is not free of literal copying, thus hindering the profitability of the company utilizing the autonomous software.

While an audiovisual production would be protected under copyright, the underlying AI-generated script could be exploited by an individual with access. Despite a script being commercially available, individuals may not lift dialogue and scenes for use in a new script under basic copyright

102. *Id.*

103. *Id.* at 2100-01; *see* Letter from Robert J. Kasunic to Van Lindberg, Esq., *supra* note 20.

104. Gervais, *supra* note 12, at 2106.

105. 982 F.2d 693, 706-12 (2d Cir. 1992).

106. *Id.*

107. *Id.*; *see also* Gates Rubber Co. v. Bando Chem. Indus., 9 F.3d 823, 841 (10th Cir. 1993) (applying of the abstraction-filtration-comparison test further).

108. *Altai*, 982 F.2d at 706.

109. Thaler v. Perlmutter, 687 F. Supp. 3d 140, 150 (D.D.C. 2023).

laws.[110] However, with an AI-generated script under the 2023 WGA Agreement, the underlying script would be free to copy without legal consequences. As discussed in the *Zarya of the Dawn* registration denial letter, the Copyright Office found that the text may be registered because Kashtanova did not use AI in its creation, and the text contained more than a "modicum of creativity."[111] Reversing the grant of copyright, the registration for *Zarya of the Dawn* now excludes the AI materials and only includes the original authorship materials, namely the text and the original selection or arrangement of the materials.[112] This separation of protections follows Gervais's proposed test and the abstraction-filtration-comparison test as applied to computer programs. With an AI script, the Copyright Office is more likely to filter out any unprotected AI materials. Thus, if a script is completely written by AI, the script will be treated as public domain material and not protected under copyright.

Further, if a script is not protected by copyright, an individual may use the work to generate a derivative expression free of copyright infringement.[113] For example, any individual could take an underlying AI-generated script, with or without an audiovisual component already produced, and turn it into a sound recording instead. Because a sound recording does not rely on a visual component like an audiovisual work, a sound recording of an AI-generated script would not infringe on the AI-generated script or a potential audiovisual version of that script.[114]

Additionally, an unprotected AI-generated script could be translated into another literary work, such as a book, where an individual may include a sufficient amount of creative human choices to receive copyright protection for the book rather than the AI-generated story.[115] An idea is not copyrightable, but the expression of the idea is subject to copyright

110. 17 U.S.C. § 501(a).

111. Letter from Robert J. Kasunic to Van Lindberg, Esq., *supra* note 20, at 4 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991)).

112. Letter from Robert J. Kasunic to Van Lindberg, Esq., *supra* note 20, at 12.

113. *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 37-38 (2003) (holding that plagiarism of public domain acts is not a crime under the Lanham Act).

114. 17 U.S.C. § 101 ("'Audiovisual works' are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.").

115. *See* 17 U.S.C. § 107 (not addressing the defense of fair use in depth but implying that an individual may argue a fair use defense in use of AI-generated works); *see also Feist*, 499 U.S. at 345-46.

protection.[116] Thus, a book treatment of an AI-generated script or idea would likely not infringe on the underlying, unprotected AI-generated script because the idea was not expressed by a human author in a copyrightable form.

Finally, in the case where an entertainment studio has already produced the AI-generated script as an audiovisual work, such as a movie or television episode, an individual may take that unprotected underlying script and develop another audiovisual production, so long as it is sufficiently transformative under fair use so it does not infringe on the initial audiovisual production.[117] With potentially many other methods to circumvent copyright infringement of AI-generated material, these examples illustrate an entertainment studio's powerlessness in the face of potentially profitable material being used freely by the public solely because AI materials are not copyrightable in the current legal landscape.[118]

In addition to the futility of copyright protection in AI-generated works, entertainment studios may open themselves up to lawsuits by using AI systems that generate works potentially using copyrighted works as reference material.[119] Currently, copyright infringement lawsuits are pending against companies developing artificial intelligence systems for the use of copyrighted materials in the systems' training.[120]

On September 19, 2023, the Author's Guild of America ("Author's Guild") and numerous authors, such as George R.R. Martin, John Grisham, and Jodi Picoult, filed a complaint against OpenAI, Inc., an AI research and development company that developed ChatGPT,[121] arguing OpenAI infringed on the authors' literary works by copying the books into its "large

116. *See* 17 U.S.C. § 102(b) (noting that while ideas, concepts, and methods are not protected, the specific expression of those ideas may be copyrightable).

117. *See* 17 U.S.C. § 107(1) (noting that fair use permits the reproduction or adaptation of a copyrighted work for purposes such as criticism, comment, teaching, or research, and requires consideration of whether the use is transformative and the purpose and character of the use); U.S. Copyright Office, *U.S. Copyright Office Fair Use Index*, COPYRIGHT.GOV, https://copyright.gov/fair-use/index.html (last visited Mar. 22, 2025).

118. *See* 17 U.S.C. § 102 (noting that while original audiovisual works are protected, the underlying ideas are not and can be reused if the new work is transformative).

119. *See* 17 U.S.C. § 501(a) (defining copyright infringement as the violation of rights granted under the Copyright Act which presumes the underlying work is protected, something AI-generated content currently lacks).

120. *See*, *e.g.*, Complaint, Authors Guild v. OpenAI, Inc., No. 1:23-cv-8292 (S.D.N.Y. filed Sept. 19, 2023); Complaint, Getty Images, Inc. v. Stability AI, Inc., No. 1:23-cv-00135-UNA (D. Del. filed Feb. 3, 2023); Complaint, Tremblay v. OpenAI, Inc., 716 F. Supp. 3d 772, (N.D. Cal. 2024) (No. 3:23-cv-03416).

121. *About*, OPENAI, https://openai.com/about (last visited Mar. 22, 2025).

language models."[122] The complaint alleges that the training of AI on the authors' literary works endangers an author's livelihood.[123]

Similarly, on July 7, 2023, Sarah Silverman and two other co-plaintiffs also filed a lawsuit against OpenAI, Inc. for copyright infringement, arguing that "large language models" train on their copyrighted books.[124] Silverman and her fellow plaintiffs exemplified that copying by showing ChatGPT generates summaries of the plaintiffs' works when prompted.[125] Like the Author's Guild, the Silverman complaint claims the copying by these "large language models" companies profit from the use of the plaintiffs' copyrighted works.[126]

Different from the previous two pending lawsuits, Getty Images, a creator and distributor of digital and photographic images,[127] filed a claim against Stability AI, Inc., the creator of an image-generating model, Stable Diffusion,[128] for copyright infringement of "*more than 12 million* photographs."[129] The Getty Images complaint argues that Stability AI used the copied images to build its business and did not negotiate for a license for the images, which is how Getty Images turns a profit.[130]

Further, on January 13, 2023, three artists (Sarah Anderson, Kelly McKernan, and Karla Ortiz) also filed a complaint against Stability AI, Inc., Midjourney, Inc., and DeviantArt, Inc. with claims of copyright infringement.[131] As the owner of the software Stable Diffusion, the complaint alleged Stability AI used the artists' copyrighted images to train the software and stored the images without the artists' consent or

122. Complaint ¶¶ 1-2, *Authors Guild*, No. 1:23-cv-8292; *but see* Andrew Albanese, *Judge Will Toss Part of Authors' AI Copyright Lawsuit*, PUBLISHERS WEEKLY (Nov. 13, 2023), https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/93726-judge-will-toss-part-of-authors-ai-copyright-lawsuit.html (dismissing the lawsuit without prejudice, but keeping the claim against Meta arguing its "use of unauthorized copies to train its AI model is infringing").

123. Complaint ¶ 2, *Authors Guild*, No. 1:23-cv-8292.

124. Complaint ¶¶ 2-3, *Silverman*, No. 3:23-cv-03416; *but see* Blake Brittain, *US Judge Trims AI Copyright Lawsuit Against Meta*, REUTERS (Nov. 9, 2023, 3:51 PM EST), https://www.reuters.com/legal/litigation/us-judge-trims-ai-copyright-lawsuit-against-meta-2023-11-09/ (dismissing the claim the AI's generated text infringed on authors' copyrights, but allowing the authors leave to amend their claims).

125. Complaint ¶ 2, *Silverman*, No. 3:23-cv-03416.

126. *Id.*

127. Complaint ¶¶ 1-5, Getty Images, Inc. v. Stability AI, Inc., No. 1:23-cv-00135-UNA (D. Del. Feb. 3, 2023).

128. *Id.* ¶¶ 7-8.

129. *Id.* ¶ 1.

130. *Id.* ¶¶ 1, 8.

131. Complaint, Anderson v. Stability AI Ltd., 700 F. Supp. 3d 853 (N.D. Cal. 2023) (No. 3:23-cv-00201).

compensation.[132] By training the artificial intelligence software on these copyright images, any images reproduced by the software would compete with the original images.[133] Although a judge dismissed most of the claims in October 2023, the court granted the artists leave to amend and kept the claim by Sarah Anderson against Stability AI, reasoning that the claim, whether copyright infringement occurred during training of Stable Diffusion or when the software runs, was still at issue.[134]

These lawsuits flow from the same concern: infringement on the copyrighted work is an infringement on its profitability. Originally, the U.S. Constitution intended to incentivize the creative process to "promote the Progress of Science and useful Arts" by providing human authors with copyright.[135] By allowing artificial intelligence programs to use and train on copyrighted works without consent or proper accreditation, these actions by AI developers curb the inventive to create new works without the protection from copying. By allowing the use of AI technology that likely relies on copyrighted works, entertainment studios risk liability as secondary infringers of those copyrighted works.[136]

Artificial intelligence is a technology that continues to grow in scope and potential. However, with few restrictions on its training or use,[137] companies and individuals do not contemplate the legal implications of generating material with and through AI systems trained on copyrighted materials. The use of artificial intelligence in entertainment poses a potential risk, not only in litigation but also in enforcing copyright. Like authors being exploited by AI developers, entertainment studios risk exploitation by anyone if an underlying script is not protected by copyright. Without human authorship, the potential of artificial intelligence becomes a legal rights nightmare that is easily resolved by hiring a human to do the same work.

V. CONCLUSION

By exploring the original authorship requirement under the Copyright Act, judicial precedent, and the Copyright Office's guidelines, the legal implications of using artificial intelligence to generate scripts become clear.

---

132. *Id.* ¶¶ 2-4.

133. *Id.*

134. Stacey Chuvaieva, *Federal Judge Largely Dismissive of AI Complaint: Anderson v. Stability AI*, MSK (Oct. 31, 2023), https://www.msk.com/newsroom-alerts-Federal-Judge-Dismissive-of-AI-Complaint.

135. U.S. CONST. art. I, § 8, cl. 8.

136. 17 U.S.C. § 501.

137. *What Is Generative AI?*, *supra* note 17.

Parts III and IV illustrated that, under the current understanding of the Copyright Act, scripts generated by AI would not receive copyright protections. Thus, AI-generated scripts are open to copying without legal consequences. Further, Part IV scrutinized how material generated by a machine, like artificial intelligence, would not vest copyright in a singular author and instead fall into the public domain automatically. With AI materials falling into the public domain, the profitability of works that include artificial intelligence is reduced.

In the context of the WGA strike, the ratified 2023 agreement exemplified the legal precedent and the current understanding of generative artificial intelligence. By rejecting any authorship rights of artificial intelligence,[138] the ratified WGA agreement correctly follows previous interpretations of the Copyright Act's original authorship requirement. However, the ratified agreement expires in three years,[139] allowing for renegotiation of the current provisions. Although generative artificial intelligence continues to grow in scope, no one can perfectly predict the technology's potential function in 2026. To continue promoting science and the useful arts of human authors,[140] regulations on artificial intelligence must be considered now before it is too late to protect writers and other creative entities.

138. MEMORANDUM OF AGREEMENT, *supra* note 3, at 68.

139. *Id.* at 1.

140. U.S. CONST. art. I, § 8, cl. 8.