First Request for Reconsideration
Service Request Number: 1-11743923581
Correspondence ID: 1-5IVDL1X
Name of Claimant: Jason Allen
Title of Work: Théâtre D'opéra Spatial

On behalf of claimant Jason Allen, we respectfully request that the U.S. Copyright Office reconsider its refusal to register the copyright claim in the work Théâtre D'opéra Spatial (the "**Work**"). The reasons cited by Examiner Mander in the letter dated December 13, 2022, Correspondence ID: 1-5IVDLIX (the "**Refusal Letter**"), reflect a misunderstanding of how the Work was authored, and a misapplication of the Copyright Act of 1976 (the "**Copyright Act**") and the Compendium Third of Copyright Office Practices (the "**Compendium**," and together with the Copyright Act, the Progress Clause of the U.S. Constitution, and other sources of U.S. copyright law, collectively, "**Copyright Law**").

Introduction

Mr. Allen's process of creating the Work is fundamentally consistent with the process of creation for other visual works that receive the protection of registration with the Copyright Office, and, likewise, deserves to be registered and protected.
The novelty and uncertainty of artificial intelligence ("**AI**") technology and tools is undoubtedly a significant challenge facing the Copyright Office, and a modicum of sympathy is certainly due for those attempting to apply existing law accurately and uniformly to works made using any form of AI. Further, if, as it appears from recent decisions, the Copyright Office has taken the position that the use of AI tools renders a work ineligible for copyright protection, then we must accept that position and look forward to new legislation to protect creators using AI tools. However, we think there is room to distinguish works authored with the use of AI as "merely an assisting instrument," as the Compendium framework provides, versus those where the AI stands in place of the traditional human role of creation, and feel strongly that the Work fits comfortably in the former category.

In short, the Work should be registered because the Examiner misapplied the "human authorship" requirement; Copyright law focuses on the origin of the idea expressed; Mr. Allen contributed original authorship to create a unique work; AI tools should be treated like other tools available to artists; the Examiner considered improper factors; and numerous public policy reasons require registration of the Work.

1) Misapplication of the Human Authorship Requirement

The main reason for denial in the Refusal Letter was that the Work did not meet the human authorship requirement under the Copyright Act. The Refusal Letter begins by stating bluntly that "the deposit does not contain any human authorship; instead the deposit contains only material that your client solicited from an artificial intelligence art-generator." However, the AI tool does not replace the requirements of human intelligence and discernment in creating a tangible expression of an artistic idea. Sections 306 and 313.2 of the Compendium set forth the human authorship requirement and provide examples of works that do not meet the requirement. Authorship by nature, non-human animals or plants is not relevant here. The inquiry focuses instead on the second part of Section 313.2, which reads:

> "Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically *without any creative input or intervention* from a human author. The crucial question is whether the 'work' is basically one of human authorship, with the computer [or other device] merely being an assisting instrument, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually *conceived and executed* not by man but by a machine."[1]

Here, Mr. Allen used a novel tool to assist in creating the vision he had in his mind's eye. It would be impossible for the Midjourney AI program to independently create an artwork without human intervention. The element of human authorship is certainly present in the Work.

[1] Compendium of Copyright Office Practices, Third Edition, Published 1/28/2021, available at copyright.gov/comp3/chap300/ch300-copyrightable-authorship.pdf

2) Copyright Law Focuses on the Origin of the Idea Expressed

The inquiry with respect to human authorship focuses on whether the work at issue is an expression of a human idea, not what tools were used in the process of creation. The core element of copyright is an artistic or creative thought, originating in the mind of a human, that is then expressed in some tangible medium. The term "author" identifies the human in which the thought originated and who goes about bringing the thought into the world by expressing it in some medium.

With this understanding, it becomes clear that deeming an AI tool as the author is nonsensical; an AI tool does not have or originate independent thoughts, and does not go about attempting to express its own ideas. The ideas and creativity expressed in the Work are and always were human-authored, as there is no reason to believe the AI tool is able to have ideas, consider different ways an idea could be expressed, or determine whether the idea is being expressed as it executes its programming. Furthermore, the human controlling the AI certainly has produced a work that has more than a trace of originality. Courts have found "it is now settled beyond question that practically anything novel can be copyrighted," even if there is only a "faint trace of originality." Dan Kasoff, Inc. v. Novelty Jewelry Co., 309 F.2d 745, 746 (2d Cir. 1962). "All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own. . . . No matter how poor artistically the 'author's' addition, it is enough if it be his own." Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102–03 (2d Cir. 1951) (finding that plaintiff's mezzotints consisting of reproductions of works in the public domain subject to Copyright protection because the Copyright Act "explicitly provides for the copyrighting of translations, or other versions of works in the public domain and that the mezzotints were such 'versions'"). Id. at 104.

Copyright law exists to encourage creativity and innovation by providing legal protection for creative works. AI-assisted artwork is a new and innovative form of creative expression, and it should be eligible for the same protections as other forms of creative expression, such as traditional painting or sculpture.

3) Allen contributed more than a "trace of originality" in creating the Work

In this matter, Allen did more than simply press a button on a machine to create artwork. It has been established that handing a monkey a camera then seeing what pictures it takes does not lead to photographs that are protectable under Copyright Law. However, if the artist goes about "selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression" (Burrow-Giles Lithographic Co. v. Saron*y*, 111 U.S. 53 (1884)), but has simply trained the monkey to press the button on the camera to take the picture when the artist gives the monkey a signal the monkey has been trained to follow, then surely the physical act of pressing the button does change the copyrightability of the photograph. Here, Mr. Allen's process involved continuous interactions "directing" the look and feel of the artwork until the final result was achieved.

The Copyright Office's initial refusal in this matter could set a discriminatory precedent that would prevent, for example, quadriplegics who originate the idea for artwork and go about the same process identified in Burrow-Giles, but require an assistant or a voice recognizing machine to actually press the button on the camera. This underscores that the human authorship requirement is not an arbitrary rule against animals or trees, but simply a way to identify the intent of copyright protection – to protect the expression of creative ideas, which creative ideas, by definition, can only come from humans given what we know (or don't know) about non-human cognition, whether animal or machine. Further, it is consistent with the "*sin qua non* of copyright": originality (Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 345 (1991)). Originality works as dividing line between protectable and non-protectable works because the idea did not originate in the mind of the person copying another artist's work.

4) AI Assisted Art is Analogous to Photography

The arguments against protecting works created with AI tools seems analogous to the issue addressed in Burrow-Giles, where the copyrightability of photographs was

challenged. Examiner Mander states in the Refusal Letter that Mr. Allen "did not paint, sketch, color, or otherwise fix any of the deposit." It would only be appropriate to reference the AI tool used in creating the Work as an author if it is appropriate to reference the camera used by a photographer, the effect pedal used by the guitarist, the synthesizer used by the producer, or any other tool that allows for an author to express an idea that would not be possible without the use of a machine. This seems identical to the argument that the Burrow-Giles court rejected (emphasis added):

> "[I]t is said that an engraving, a painting, a print, does embody the intellectual conception of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the constitution in securing its exclusive use or sale to its author, while a photograph is the mere mechanical reproduction of the physical features or outlines of some object, animate or inanimate, and involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture. That while the effect of light on the prepared plate may have been a discovery in the production of these pictures, and patents could properly be obtained for the combination of the chemicals, for their application to the paper or other surface, for all the machinery by which the light reflected from the object was thrown on the prepared plate, and for all the improvements in this machinery, and in the materials, the remainder of the process is merely mechanical, with no place for novelty, invention, or originality. It is simply the manual operation, by the use of these instruments and preparations, of transferring to the plate the visible representation of some existing object, the accuracy of this representation being its highest merit. This may be true in regard to the ordinary production of a photograph, and that in such case a copyright is no protection. On the question as thus stated we decide nothing.

Burrow-Giles at 58–59.

In other words, the Court distinguishes between photographs taken with no artistic intent (i.e., the result of someone pointing a camera in a random direction and clicking the button), versus those that have been composed and reflect the artistic ideas of the photographer. This is consistent with the notion that the proper focus of examination is whether the work reflects a physical expression of an idea that originated in the mind of the human author. The court dismisses a narrow reading of the word "author," and identifies the common characteristic of "writings" that fall within the scope of copyright protection as those forms "by which the ideas in the mind of the author are given visible expression." Burrow-Giles at 58.

Like photography, which rests on scientific principles and "the chemicals and machinery by which it is operated" Id., the AI tool simply rests on computer programming principles and the machinery on which such computer programs are operated. The Burrow-Giles court succinctly concludes that it "entertains no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs, *so far as they are representatives of original intellectual conception of the author*." Id. (emphasis added).

The Work at issue here was composed by Mr. Allen in a similar manner to the photographer in Burrow-Giles. Instead of posing the subjects and physically moving objects to arrange them for a photograph, Mr. Allen used written prompts to instruct the AI tool with respect to lighting, arrangement of the objects, and selecting and arranging accessories and details displayed in the Work, and thereby produce the Work as an expression of the idea in Mr. Allen's head.

Notably, the court made no mention of the need to distinguish between the elements of the photograph attributable to the photographer versus the elements that unintentionally appeared in the photograph. Surely the court was aware that the photographer did not literally determine where each band of light might fall on the subject, or how other elements may appear in the photograph in a way that was accidental or even contrary to the intent of the photographer. Similarly, it seems beyond the proper scope of examination to delve into such details in the Work.

5) Improper Factors in Examination

The reasons cited in the Refusal Letter suggest the consideration of factors during the examination of the Work in contradiction of section 310 of the Compendium.[2] It seems that there is a tension between the intuition about skill required to create the Work, and requirement to not judge the artistic merit, effort, or skill required to create the work. In

[2] Compendium of Copyright Office Practices, Third Edition, Published 1/28/2021, available at copyright.gov/comp3/chap300/ch300-copyrightable-authorship.pdf

this matter, the Examiner seems to have considered a number of factors that the Compendium specifically prevents, for instance:

> Section 310.2: "In determining whether a work contains a sufficient amount of original authorship, the U.S. Copyright Office does not consider the aesthetic value, artistic merit, or intrinsic quality of a work."
>
> Section 310.5: "Evaluating the author's inspiration or intent would require the Office "to consider evidence of the creator's design methods, purposes, and reasons." Star Athletica, 137 S. Ct. at 1015. The Supreme Court has made it clear that copyrightability should be based on how a work is perceived, not how or why it was designed."
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> Section 310.6: "When examining a work for original authorship, the U.S. Copyright Office will focus on the appearance or sound of the work that the author created *but will not consider the amount of time, effort, or expense required to create the work*. These issues have no bearing on whether a work possesses the minimum creative spark required by the Copyright Act and the Constitution. See, e.g., Feist, 499 U.S. at 352-354, 364 (rejecting the so-called "sweat of the brow" doctrine that provided copyright protection solely as a "reward for the hard work" of creating a work); Star Athletica, 137 S. Ct. at 1015 ("our inquiry is limited to how the [work is] perceived," not how it was designed). As Justice O'Connor observed, "copyright rewards originality, not effort" and "[w]ithout a doubt, the 'sweat of the brow' doctrine flouted basic copyright principles." Feist, 499 U.S. at 352, 354, 364."

Each of these standards seem to have been violated during the examination of the Work, which is likely what has caused the Copyright Office's recent confusion with respect to the use of AI tools. Because the work appears to be complex, detailed and display a certain aesthetic grandeur, it seems to challenge the viewer's preconceived notion of the type of skills the artist should possess in order to create the work. However, there is no requirement that a photographer prove that he could draw or paint the subject of the photograph, nor that a painter be able to prove the textures created by his brushstroke were intentional. As the court succinctly states in Mazer v. Stein, 347 U.S. 201 (1954), "[i]t is clear Congress intended the scope of the copyright statute to include more than the traditional fine arts."

It seems that the Examiner is requiring Mr. Allen to prove that he could have created the work using previously-accepted tools or mediums, rather than the novel tools currently available. It is difficult to see how this is not the result of a value judgment as to the aesthetic value or artistic merit of the work, and the subsequent request for proof that the author demonstrate certain arbitrary artistic abilities that have no bearing on the creative idea being expressed in the Work.

Requesting the prompts Mr. Allen used feels like somewhat of a trap. First, if no standard has been set for what particular prompts would satisfy the Examiner, then the Examiner can use the number or complexity of prompts as a proxy to reject the Work from eligibility for Copyright Protection. Second, the prompts presumably would be viewed as the "idea" instead of the "expression." We want to be clear that Allen is not attempting to gain Copyright protection of the prompts. Third, showing the prompts could have the effect of explaining a magic trick; i.e. That once it becomes known, it seems far less impressive. Similarly, the perception of the complexity of the prompts does not indicate the skill of the artist using the AI tool to create. The work should be examined without this bias. Fourth, this seems like a skills test. Presumably painters are not required to submit a video of themselves painting to prove they created the painting. The same should be true for the use of other tools. The Copyright Office's position is inconsistent with the myriad approaches to artistic expression and creation, and would unnecessarily restrict the processes artists may use, or be willing to disclose, to create their works.

6) Public Policy Requires that "AI Art" Obtain Copyright Protection

The human authorship complaint seems to disguise the real objection many people have to the use of an AI tool, which can be summed up as "it's not fair." It doesn't seem fair that for centuries an artist was required to develop and hone certain skills in order to be able to express their creative ideas, yet today, they can more easily create a visual depiction of what already appears in their mind's eye. However, there are several reasons the Copyright Office should reject this instinctual reaction and register the copyright in the Work. Critiques of the use of AI in artistic expression suggest a

fundamental misunderstanding of the origin of ideas. For social and intuitive reasons, we credit the artist with originating the ideas expressed in a work. However, one of the most profound and unanswered mysteries is how and why idea come to be in our minds in the first place. The unsettling reality is that humans do not know why ideas pop into their head (both in terms of content and timing), what inputs their brain stored and reprocessed to form inspiration for creative works, or why certain forms and mediums of expression appeal to some artists and not others. Copyright protection of AI-assisted works will provide legal protection and a framework for monetizing such creations.

a) **More artists will be able to express their ideas**.

The language of the Progress Clause in the U.S. Constitution advises a more accepting and forward looking approach of accepting the use of new technology in the process of creation and the expression of creativity. The Copyright Office's position in the Refusal Letter would seem to impose certain physical requirements that would render it nearly impossible for humans without access to traditional means of creative expression, for example an artist with ALS who has become paralyzed, to ever receive the credit and protection of authorship. This would be particularly unfortunate at this moment in human history when the creative ideas locked inside the minds of those without a means of expression to finally be able to share those ideas with the world. While it is without question that great artists spend years honing their skills in order to create their works, it is also unquestionable that humans are born with varying innate abilities, and those who are not born with innate artistic abilities have always been at a disadvantage. AI tools threaten (or allow) more people into the creative space because they even the playing field for those with the same creative ideas but who were not blessed with innate traditional artistic abilities.

b) **The Copyright Laws have a built-in protective mechanism of limiting the scope of protection in works.**

The scope of protection being sought by Mr. Allen for the work is no greater than any other author. While Allen and counsel believe that the Work contains a great deal of original authorship, even if the amount off original authorship is considered minimal, Allen simply wants to protect that "something unique" and "irreducible" that even "a very modest grade of art has in it." Mazer at 205, footnote citing Bleistein v. Donaldson Lithographing *Co.*, 188 U.S. 239, 249-250. The discussion in Feist with respect to the scope of protection for original compilations is instructive here. Justice O'Conner clarifies that the restriction on copyrighting the underlying facts in a compilation "inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement." Feist at 349.

A similar situation exists here. Other artists are free to use the same AI tool that Mr. Allen used, and depending on what ideas they wish to express may create works that are very similar to the Work. The Midjourney AI tool uses works in the public domain as a reference in creating new works. The fact that another artist's work looks similar to Mr. Allen's work in certain ways as a result of using the same AI tool is not more concerning than similarities resulting from two painters using the same type of paint, brushes and canvas, or two photographers using the same camera and lens. However, Mr. Allen's protection would prevent others from circumventing the creative or creation process completely, and simply using the Work, for example on t-shirts, for their own financial gain. This type of infringement has already occurred and without Copyright registration, Mr. Allen is in a weak position with respect to enforcement. This is no different than the desire of all other artists and creators, and why copyright protection is seen as such a valuable social development.

c) **The market should determine the difference in value between a work creating using a paint brush versus an AI tool.**

It requires little discussion to make this point other than to restate the old saying that "beauty is in the eye of the beholder." The value placed on art is and has always been

completely arbitrary. If Mr. Allen's work is devalued over time as a result of societal views on the use of the AI tool, then so be it. That should have no bearing, however, on whether the Work has met the requirements for copyright protection.

d) AI-assisted artwork should be granted copyright protection to protect creators of unique works.

AI Artwork should be treated consistently with other works. Allowing AI-assisted artwork to be eligible for copyright registration could help to foster the growth of the AI art community and encourage the development of new and innovative works. By providing legal protections for AI-assisted artwork, creators and artists would be more likely to share their work and collaborate with others, which could lead to the creation of new and exciting works of art. This could lead to the creation of new and innovative works of art, as well as the growth of new businesses and job opportunities in this field.

Allowing AI-assisted artwork to be eligible for copyright registration could help to ensure that the creators of the AI are fairly compensated for their work. If AI tools are able to help artists generate original and creative works, it stands to reason that the creators of the AI should be entitled to receive the same protections and benefits as any other artist. Registering AI-assisted artwork with the Copyright Office will help to clarify the legal rights and responsibilities of the various parties involved in the creation of such works. It is important to determine who owns the copyright to the resulting work and how any potential profits should be divided.