

Second Request for Reconsideration
Service Request Number: 1-11743923581
Correspondence ID: 1-5T5320R
Name of Claimant: Jason Allen
Title of Work: Théâtre D'opéra Spatial

Via email: reconsideration@copyright.gov

On behalf of claimant Jason Allen, we respectfully request that the U.S. Copyright Office reconsider its denial to grant registration of the copyright claim in the work Théâtre D'opéra Spatial (the “**Work**”). The reasons cited by Attorney-Advisor Muller in the letter dated June 6, 2023, Correspondence ID: 1-5T5320R (the “**Denial of Reconsideration**” or “**Refusal**”) discount the extent, nature, and character of any human authorship involved in creation of the Work; incorrectly characterizes Midjourney’s role in the creation of the Work; improperly and prejudicially requires the author to list tools used the creation of his Work; and, if the Denial’s rationale were applied to all creators who use non-human tools to assist in the creation of their work, it would result in broad uncertainty with respect to ownership. Additionally, Fair Use doctrine would allow for registration of the work, and the Copyright Office’s refusal to register the entire Work would lead to dangerous precedent, stifling creativity and discouraging artists to use new and emerging tools to concoct complex and unique works that challenge assumptions.

1. Human Authorship

The Copyright Office found that the “initial image generated by Midjourney and the upscaling performed by Gigapixel AI lack the human authorship that is essential for copyright protection.” In doing so, the Office ignores the essential element of human creativity required to create a work using the Midjourney program.

The Copyright Office cites Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56 (1884) as supporting its denial of registration; however, a close reading of that case would

cause the opposite result. As mentioned in the First Request for Reconsideration, the goal of the Supreme Court in Burrow-Giles was to provide “authors” with the exclusive right to their “writings,” regardless of whether the tool used to create same was novel or widely used. The Court in that case found that the photographer had created a “useful, new, harmonious, characteristic, and graceful picture. . . . entirely from his own original mental conception, to which he gave visible form by posing the [subject] in front of the camera, 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, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture.” Id., 111 U.S. 53 at 60.

The Copyright Office cites another part of the Burrow-Giles decision as requiring human authorship of a work, disregarding the immediately preceding sentence which clearly expresses the desire of the Supreme Court to include new and useful technologies amongst the tools with which works subject of copyright protection may be created: “the only reason why photographs were not included in the extended list in the act of 1802 is, probably, that they did not exist, as photography, as an art, was then unknown, and the scientific principle on which it rests, and the chemicals and machinery by which it is operated, have all been discovered long since that statute was enacted.” Id. at 58. Substitute “AI programs” for “photography,” and you may arrive at the proper conclusion that AI tools can help create original works of authorship. Our courts consistently interpret the Copyright Act and Copyright Law in light of technological evolution.

Similarly, the Office’s citation to Waldman Pub. Corp. v. Landoll, Inc., 43 F.3d 775, 782 (2d Cir. 1994) fails to consider the entire case and decision in context. In Waldman, the Court concluded that a publisher who created books following the same format as another line of popular children’s books was indeed capable of copyright protection: “a derivative work is copyrightable if it is sufficiently original. . . the test of originality is concededly a low threshold. By this definition, the Waldman books are original works. The *selection* of which episodes in the classics to include in the books, the *redrafting of the text* to tailor

the books to young readers and *the illustrations* add more than a quantum of originality to the original works.” Waldman Pub. Corp. v. Landoll, Inc., 43 F.3d 775, 782 (2d Cir. 1994) (emphasis added). Additionally, Schrock v. Learning Curve Int’l, Inc., 586 F.3d 513, 516 (7th Cir. 2009) involves requiring a heightened standard of originality for copyright in a derivative work, and not a judgment about the quantity or quality of human authorship. Id.

The “ambivalence and occasional antagonism” towards AI technologies should not color the Office’s consideration of the Work’s eligibility for registration. Similar attitudes previously existed towards photography and spilled into the debate over whether to extend copyright protection to photographs. SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 307 (S.D.N.Y. 2000). Ultimately, an author of any creative work is “someone who creates the work himself, *i.e.*, does not copy it from someone else. Second, an author must imbue the work with a visible form that results from creative choices.” Id. at 308.

The Supreme Court renounced the distinction between the artistic and the ordinary in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903). In describing the circumstances when the requisite creativity may be satisfied, Justice Holmes notes that “the [work] is always the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.” Id. The totality of this body of case law strongly suggests that human authorship is present even in works that use newer technologies, because it is human creativity that caused such a work to exist at all. Without a human conceiving of an idea and manipulating tools – whether paintbrushes or computer programs – to visually manifest that idea, no creative work could materialize. 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.”

2. Role and Mechanics of Midjourney and Gigapixel AI

The Copyright Office’s statement that it is “clear that it was Midjourney—not Mr. Allen—that produced this image” (Refusal at 6) is a false assertion at worst or an unsubstantiated argument at best. The Office states that Allen did not “exercise any control over the actual creation, development, or execution of the image that Midjourney rendered on his screen. Simply put, the resulting image was the output of the artificial intelligence technology, and your correspondence does not identify any specific creative authorship in this image that can be attributed to Mr. Allen.” At the same time, the Office acknowledges the long and tedious process by which Mr. Allen created the Work, recognizing indeed that creative authorship can be attributed to Mr. Allen. He entered a series of prompts, adjusted the scene, selected portions to focus on, and dictated the tone of the image. Such creative input is surely on par with that expressed by other types of artists and capable of Copyright protection. See, e.g., Friedman v. Guetta, No. CV 10-00014 DDP JCX, 2011 WL 3510890, at *3 (C.D. Cal. May 27, 2011) (“plaintiff made related decisions about light and shadow, image clarity, depth of field, spatial relationships, and graininess that were all represented” in the copyrighted work); Waldman Pub. Corp. v. Landoll, Inc., 43 F.3d 775, 782 (2d Cir. 1994); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884).

Under the Office’s decision, the camera itself in Burrow-Giles Lithographic Co. v. Sarony would own the image that was generated. Claiming that Allen did not have “sufficient control over the resulting images to be considered the author of the AI’s output” is not supported by factual, concrete evidence and relies on ignoring the actual evidence of Midjourney being a multi-modal interaction system which by definition *requires human interaction and input*. Computers and their systems do not exist naturally in the world like plants, animals, humans, or other forms of life, without effort by humans, hence the word “artificial” which literally means “man-made.” The Copyright Office has not matched the submitted evidence describing the creative process with anything which demonstrates beyond doubt that the Work produced lacks human authorship.

The National Commission on New Technological Uses of Copyrighted Works (“CONTU”) in 1981 recommended that “continued availability of copyright protection for computer programs is desirable” and “in keeping with nearly two centuries’ development of American copyright doctrine, during which the universe of works protectible by statutory copyright has expanded along with the imagination, communications media, and technical capabilities of society.” Final Report on the National Commission on New Technological Uses of Copyrighted Works, 3 Computer L.J. 53 (1981) at *11, available at <https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1573&context=jitpl>. CONTU indicated that eligibility for copyright registration does not depend on the use of devices in its creation, but rather on the presence of at least minimal human creative effort at the time it was produced. The Commission additionally warned of making value judgments regarding the legitimacy of a work:

Courts have assiduously avoided adopting the critic’s role in evaluating the aesthetic merits of works of authorship. To attempt to deny copyrightability to a writing because it is capable of use in conjunction with a computer would contravene this sound policy. Where could a meaningful line of demarcation be drawn? Between flow chart and [sic] source code? Between source code and object code? At the moment of input into a computer or microprocessor? The Commission believes that none of these is appropriate. The line which must be drawn is between the expression and the idea, between the writing and the process which is described. This proposal acknowledges the propriety of keeping cultural value judgments out of copyright. The only legitimate question regarding copyrightability is: Is the object an original work of authorship?

Id. at *25.

The Copyright Office also misinterprets the use of Gigapixel AI as the author of the upscaled image. The Office wrongly concludes that the use of Gigapixel AI “was not a ‘simple’ mechanical process,” (Refusal at 8) yet provides no sound reasoning to support this assertion. The Office appears to misunderstand the technical process involved. Gigapixel AI uses machine learning algorithms to upscale the image – it doesn’t introduce new artistic elements. It performs the function it was programmed to perform by a human, in this case Mr. Allen, just like a paintbrush does not add new strokes to a painting on its own.

Gigapixel AI doesn't introduce new, original elements into the image – rather, it simply enhances the resolution based on the given input. This is akin to a painter using a finer brush to enhance the details of a painting, or a photographer using a filter to sharpen the image quality. These actions do not create a separate authorship – they merely serve to enhance the work of the original author. The enlargement process undertaken by Gigapixel AI does not equate to authorship. It is merely a function of the software. The same way a magnifying glass can enlarge an image for clarity, Gigapixel AI enlarges the digital image, refining its clarity but not altering the original artistic composition. It's a process of refinement, not creation. Therefore, the role of Gigapixel AI is not that of an author, but rather a tool used by the human author.

3. Improper Distinguishing of Human and alleged AI-generated components of the Work

The Office's continued refusal to grant Copyright protection to the entire Work, but only to portions that were altered with Photoshop, is troubling and suggests that the Office is placing a value judgment on the utility of various tools. The most recent Refusal notes that "the Office agrees that the modifications Mr. Allen made with Adobe Photoshop were the result of human authorship and they contain a sufficient amount of original authorship to be registered as a derivative work," but that "because this work contains an appreciable amount of AI-generated material," it must therefore limit the claim to the "human-authored elements shown in the deposit and to exclude the AI-generated components of the Work." Once again, this illustrates the conundrum the Copyright Office has created: while a non-human cannot be the author of a creative work, there is also no alternative to human ownership of a work that used AI tools to assist in the creation. Furthermore, there is no specific guidance as to what constitutes an "appreciable amount" of AI-assisted portions of a work, and therefore leaves the Copyright Office in the role of judge and jury – a result certainly never intended by our courts or legislators.

The Office tries to distinguish between the Photoshop tool and Midjourney or Gigapixel AI, noting that “even if the changes made by Gigapixel AI were human-authored, the Office finds that these types of changes – such as noise suppression, removing blurriness, or fixing compression – to be minimal image editing that is not copyrightable.” It makes one wonder if the Office, when presented with Jackson Pollock’s work, would have deemed it not capable of copyright protection because the artist had no control over where the splattered paint landed on a canvas.

4. Requirement to List Tools

Although the Copyright Office has recently enacted legislation which requires authors to indicate whether their material has been created with the assistance of AI tools (37 CFR § 202), Claimant asserts that this is an improper application of law. The Act affords protection to “original works of authorship,” a phrase which Congress left purposely undefined and for interpretation by the courts. 17 U.S.C. § 102(a). Contrary to the Office’s argument, the Office does not typically test, or have a means to test, to see if a registration is being submitted for an AI-Generated Work, or whether the portion of content created with the assistance of artificial tools is “appreciable”; the presumption until recently is that since humans are the only beings capable of creative expression, they must, by default, be credited with ownership of works whose existence they caused.

It seems that the Office is requiring Mr. Allen to prove that he could have created the Work using other tools or mediums. It 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. In contrast, the bar for originality is low. “To qualify for copyright protection, a work must be original to the author.” Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340, 345 (1991) (citation omitted). “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works),

and that it possesses at least some minimal degree of creativity.” *Id.* at 345 (citation omitted).

A person who produces a short new work or makes a small improvement in a few hours gets a copyright for that contribution fully as effective as that on a novel written as a life's work. The input of time is irrelevant. A photograph may be copyrighted, although it is the work of an instant and its significance may be accidental. Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colorado, 768 F.2d 145, 148 (7th Cir. 1985).

Similarly, the Office should not examine “the designer's artistic judgment exercised independently of functional influence” because that “would require the decision maker to consider evidence of the creator's design methods, purposes, and reasons,” whereas the Copyright Act’s text “makes clear, however, that [a court or reviewing agency’s] inquiry is limited to how the article and feature are perceived, not how or why they were designed.” Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 422–23 (2017). Each of these standards seem to have been violated during the examination of the Work, which is likely what has caused such 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.

Requiring creators to list each tool and the proportion of the work created with the tool would have a burdensome effect if enforced uniformly. Would painters need to intend for each brush stroke and striation to have a particular impact? What about the instance where an artist merely splatters paint on a canvas? Is the human responsible for the work, or the paintbrush? Do novelists now need to disclose snippets of conversation that they overheard and incorporated into their book’s scenes, or specify the humans on whom characters are based? The disclosure requirement could be the beginning of a slippery slope that would never end if applied universally to all inspiration and tools which artists use, and cannot possibly be enforced in a fair manner.

5. Denial of Copyright Protection would result in a void of ownership

An Artificial Intelligence program is not a legal person and does not have rights. It is therefore not possible for an AI to “own” intellectual property. AI-tools used to assist in the creation of an “AI-Generated Work” are not considered as a legal “employee” per se. Its functions, at least in the present case, in its capacity as personal property. We agree with the Copyright Office’s decisions (i.e., *A Recent Entrance to Paradise*) that an AI program cannot, itself, own intellectual property, since it is neither a human nor a corporation capable of ownership, but, per its definition, an artificial/man-created machine. The Office has, through its Refusal, ascribed human characteristics to non-human machines, while also acknowledging the machines’ contributions. Given the lack of AI’s ability to own a Work, and the Office’s decision denying ownership to the human who used the tool to create the Work, we are therefore left with a void of ownership troubling to creators.

We believe 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. Allen did not merely press a button to generate the Work; he used Midjourney as a tool and constantly input direction as to how he wanted the image to appear, just as a director of a photo shoot or video does. By attributing the Work to a random mechanical process, the Office disregards the importance of human user prompts in shaping the totality of the Work.

6. Fair Use

In copyright law, the doctrine of fair use allows for transformative uses of copyrighted material in certain circumstances. Section 107 of the Copyright Act of 1976 offers four considerations for courts to evaluate in determining fair.

First: The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

Second: The nature of the copyrighted work;

Third: The amount and substantiality of the portion of the copyrighted material used in relation to the copyrighted material as a whole; and

Fourth: The effect of the use upon the potential market for or value of the copyrighted material.

17 U.S.C.A. § 107 (West). Ultimately, the doctrine of transformative use is particularly useful as a tool for distinguishing fair use from infringement. Transformative use considers whether a new work merely supersedes an original creation or adds elements that create a further purpose or different character.

The 2013 case Cariou v. Prince, 714 F.3d 694 (2nd Cir. 2013) is of particular relevance in this instance. In that case, appropriation artist, Richard Prince, altered 30 photographs from Patrick Cariou's book, "Yes Rasta", in order to create a series of collages for sale at an exhibition. The alterations made to Cariou's photographs by Prince ranged from minor to extensive, including painting over parts of the images, using portions of the images in new collages, and modifying colors and backgrounds.

Cariou filed a copyright infringement lawsuit against Prince, alleging unauthorized use of his photographs. The District Court granted summary judgment to Cariou, holding that, because Prince did not comment on Cariou's work or the culture it depicted, his works were not transformative. On appeal, however, the Second Circuit overturned the District Court's decision, holding that 25 of the 30 artworks created by Prince were transformative despite relatively insignificant changes, even where Cariou's works were "readily apparent" because defendant's "composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of [defendant's] work." Cariou, 714 F.3d 694, 707 (2d Cir. 2013)

The holding explained that that the law imposes no requirement for a new work comment on the original or its author in order be considered transformative. Instead, new works can be transformative so long as they alter the original work with some “new expression.” Id at 707.

Ultimately, the court stated that...

“if [the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”

Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013), (*citing* Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 137 (2d Cir.1998) at 142); holding modified by Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99 (2d Cir. 2021), and holding modified by Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021)

In this case, the underlying AI-generated work merely constitutes *raw material* which Mr. Allen has transformed through his artistic contributions, as discussed herein. Further, by the copyright Office’s own admission, the generative AI itself has no rights that can be enforced in court. It also cannot be said that the AI-generated work has been “published” for copyright purposes, as the court has not recognized any non-human entities capacity to publish original work of authorship. To be an author, under the Copyright Act, one must be capable of intent, of making creative choices, of possessing a creative spark. Machines and AI, while capable of following instructions and executing algorithms, do not possess these qualities.

Finally, there will be no effect upon the commercial market for the new work’s underlying AI-generated material, as the commercial market for that work was and is completely limited to my client. For these reasons, regardless of whether the underlying AI-generated work is eligible for copyright registration, the entire Work in the form submitted to the copyright office should be accepted for registration.

Furthermore, the Office's interpretation would lead to dangerous precedent and a drastic reshaping of copyright law, which can adversely affect creators and stifle creativity. It is not only impractical but also fundamentally against the principles of copyright law to require authors to distinguish between their creative input and the role of the tools they used in creating their works. It can also lead to absurd results. For example, should we consider the camera the author of a photograph because it captures the image, or the brush and the paint the authors of a painting because they were used to apply the colors on the canvas? The answer is, of course, "no".

The Office has correctly identified the human authorship involved in the creation of the Work through the use of Adobe Photoshop. However, it fails to properly acknowledge the same when it comes to the use of Midjourney and Gigapixel. Mr. Allen did not merely press a button and let these tools create the Work on their own. He made creative choices at every step of the process, from selecting the input for Midjourney, tweaking its settings, choosing the enhancements in Gigapixel, to the final editing in Adobe Photoshop. These are not mechanical or mundane tasks but creative decisions made by Mr. Allen, reflecting his creative vision and transforming the underlying work into a new and original work of human authorship.

Mr. Allen's work is a product of his creative ingenuity, expressed and materialized with the help of advanced tools. His involvement in designing the initial conditions, manipulating parameters, selecting and refining the final generative outputs, all show a substantial exercise of human intellect, skill, and judgment. Therefore, the work should qualify as an "original work of authorship," as required under 17 U.S.C. § 102(a), and the Copyright Office should grant full copyright protection to the Work. Under the totality of the circumstances, we therefore request that the Copyright Office reconsider its refusal and grant registration to the entire Work.

Respectfully submitted,

/Tamara Pester/
Attorney for applicant