

## Mind the Machine: Navigating Copyright Challenges in the Art-ificial Intelligence World

### Executive Summary

In a firm ruling on September 5, 2023, the U.S. Copyright Office Review Board addressed the copyright eligibility of AI-generated art, specifically the artwork “Théâtre D’opéra Spatial” created by artist Jason M. Allen with significant help from the popular generative AI art platform Midjourney. Despite Mr. Allen’s creative inputs, the Review Board rejected the registration stressing AI’s substantial role in generating the content. (A copy of the decision can be found [here](#).)

The ruling underscored a fundamental principle that copyright requires human authorship and highlighted the critical distinction between AI and human contributions in creative works.

This decision has profound implications for artists and creators working with AI, emphasizing the importance of disclosure and understanding copyright eligibility criteria in the AI age. As AI technology continues to advance, further judicial and regulatory guidance will be crucial for addressing the evolving challenges in copyright law related to AI-generated works.



*A copy of Mr. Allen’s AI-generated artwork, which the U.S. Copyright Office ruled is not eligible for copyright protection.*

### Background

The artist, Jason M. Allen, submitted an application to register his artwork, “Théâtre D’opéra Spatial,” with the U.S. Copyright Office in September 2022. Notably, Mr. Allen did not disclose in his application that the artwork was created using Midjourney. The Copyright Office was aware of this fact, however, given the artwork’s national recognition for being the first AI-generated image to win a state annual fine art competition. Upon further inquiry by the Copyright Office, Mr. Allen explained that he had used the Midjourney AI platform to create the initial version of the artwork, followed by modifications using Adobe Photoshop and Gigapixel AI. The Copyright Office, after reviewing Mr. Allen’s explanation and

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the artwork itself, requested that the AI-generated portions be excluded from the copyright claim. Mr. Allen declined this request, leading to the initial refusal to register the copyright claim.

Following the initial refusal, Mr. Allen filed a request for reconsideration, arguing that his creative input into the AI system warranted copyright protection and that the fair use doctrine should apply. The Copyright Office, after a reevaluation, reiterated its decision, stating that the AI-generated content should be excluded from the claim as non-human authorship. Mr. Allen subsequently filed a second request for reconsideration, which led to the final ruling by the Copyright Office Review Board discussed below.

## **Ruling and Analysis**

The central issue in this case was whether the AI-generated content in the artwork could be considered for copyright protection. The Review Board answered with a resounding “no,” and refused registration of the entire work based on several key considerations:

- **Originality and Human Authorship:** The Copyright Act protects “original works of authorship,” and courts have consistently interpreted this requirement as necessitating human authorship. The ruling cited several cases that reaffirmed the principle that copyright protection is not extended to non-human creations, including the recent U.S. District Court for the District of Columbia case of *Thaler v. Perlmutter* (Aug. 18, 2023), stating that “human authorship is a bedrock requirement of copyright”; and the “key” to copyright protection is “[h]uman involvement in, and ultimate creative control over, the work at issue.”
- **AI's Role in Creation:** The Copyright Office provided guidance on how AI-generated material should be evaluated for copyright protection. The guidance emphasized that copyright protection hinges on whether “traditional elements of authorship” were conceived and executed by humans or machines. AI-generated material produced solely by AI systems cannot be copyrighted.
- **Mr. Allen's Creative Input:** Mr. Allen argued that his creative input into the AI system justified his claim for copyright protection. However, the Review Board found that Mr. Allen’s role in providing text prompts to Midjourney – allegedly more than 624 times – did not amount to human authorship of the AI-generated output. The AI system’s operation was not directed by Mr. Allen’s prompts but rather influenced by them. As these prompts functioned more like instructions to a contracted artist—specifying the prompter’s desired depictions, with the machine determining how those instructions are implemented in its output—such AI-generated material is not protected by copyright and must be disclaimed in a registration application, which Mr. Allen refused to do.
- **Policy and Fair Use:** The ruling rejected Mr. Allen’s policy argument that denying copyright protection to AI-generated material leaves a “void of ownership troubling to creators.” It clarified that the Copyright Office operates within the boundaries set by Congress and the Constitution, which exclude non-human creations from copyright protection. Additionally, the fair use doctrine, which governs unauthorized use of copyrighted works, is not applicable to the determination of copyrightability.

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- **Disclosure Requirements:** The ruling addressed Mr. Allen’s argument that requiring creators to disclose “each AI tool and the proportion of the work created with the tool” in their copyright applications would be burdensome. The Review Board noted, however, that the Copyright Office’s requirements for disclosure are straightforward and not unduly burdensome, and denied that a “detailed list of the tools used or the precise proportions of the work that were created by each one” was required.

## Implications

The Review Board’s ruling has significant implications for artists, creators, and the copyright landscape as a whole:

- **Responsibility of Creators:** Artists and other creators working with AI tools must understand the implications of using such technology in their creative processes. They should be aware of how AI-generated content may affect their eligibility for copyright protection, as human authorship is a fundamental requirement.
- **Disclosure and Exclusion:** Creators should be prepared to disclose any use of AI-generated content in their copyright applications. If a work contains more than a *de minimis* amount of AI-generated content, those portions must be disclaimed in the registration application. Be sure to follow the Copyright Office’s disclosure requirements detailed in its “Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence,” 88 Fed. Reg. 16190 (March 16, 2023), available [here](#).
- **Copyrightability of Human Contributions:** The ruling does not preclude copyright protection for human-authored elements of a work that incorporates AI-generated content. Creators should assess whether their contributions meet the threshold for copyright protection, which admittedly is not well demarcated at this stage. That said, focus on the originality and creative input in your contributions (emphasizing direction, not mere suggestion for machine interpretative execution), and be sure to document the human and non-human components of the work.
- **Ownership:** Businesses that utilize AI for content generation, like software code, videos, movie scripts, digital art, or other forms of expression, should be mindful that without a substantial level of human contribution, copyright protection will not apply and ownership of the content cannot be assumed solely based on owning the AI tool or having agreements in place to assign work product to the company.

## Looking ahead

The Review Board’s ruling on AI-generated artwork reaffirms the principle that US copyright law only affords protection to works of human creation. (Sorry, C-3PO.)

As the exact quantum of human contribution that will be needed to meet the human authorship requirement is not yet known, additional guidance from the Copyright Office is essential. Fundamentally, however, determinations of copyrightability will be made on a case-by-case basis, and the “answer will

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depend on the circumstances, particularly how the AI tool operates and how it was used to create the final work.” The level of human control and direction will likely be determinative factors in the Copyright Office’s analysis.

For those with businesses which leverage AI for content creation, developments within the evolving legal landscape of AI-generated content and copyright law should be closely monitored to ensure your IP protection and enforcement strategies are ‘coded’ for success.

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