

# AI Insights

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## Copyright Office Rejects Application for Refusal To Disclaim AI-Generated Elements

The U.S. Copyright Office has once again refused to register a visual work that included elements generated using artificial intelligence (AI). In this most recent case, the work was a digital work submitted by Jason M. Allen entitled “Théâtre D’opéra Spatial.” The crux of the Copyright Office decision was that Allen’s work contained more than a de minimis amount of AI-generated content, which Allen refused to disclaim in his application.

The Copyright Office’s denial of the registration is consistent with the views it has expressed about the centrality of human authorship in: its denial of Stephen Thaler’s attempt to register the AI-generated work “A Recent Entrance to Paradise” (where Thaler listed an AI system as the author in his copyright application) (February 2022); its decision to limit the copyright registration for the graphic novel “Zarya of the Dawn” to exclude the AI-generated images from the registration (February 2023); and its [Copyright Registration Guidance for Works Containing AI-Generated Materials](#) (March 2023) (AI Guidance). The Office’s position on the human authorship requirement with respect to AI was recently supported by a district court. (See our August 28, 2023 article, “[District Court Affirms Human Authorship Requirement for the Copyrightability of Autonomously Generated AI Works.](#)”)

### Background

Allen initially filed an application for “Théâtre D’opéra Spatial” in September 2022 but did not disclose that AI was used in the creation of the work. The Copyright Office learned about the AI usage because Allen’s work received national attention for being the first AI-generated image to win the 2022 Colorado State Fair’s annual fine art competition. As a result, the examiner assigned to Allen’s application sought additional information about Allen’s use of AI. In this respect, the fact pattern mirrors that of the “Zarya of the Dawn” application process, where the Copyright Office only learned of the applicant’s use of AI when she publicized that she was able to register an AI-generated work.

When prompted by the Copyright Office, Allen provided the requested information about his work, but refused the examiner’s request to disclaim the AI-generated portions of his work. As a result, the Copyright Office refused to grant Allen a registration in the work in December 2020, and subsequently rejected Allen’s first request for reconsideration in June 2023 after Allen again refused to disclaim the AI-generated portions of his work. Allen filed a second request for reconsideration thereafter, which was denied on September 5, 2023.

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## Allen's Process for Generating Théâtre D'opéra Spatial

Allen informed the Copyright Office that he engaged in the following steps to create Théâtre D'opéra Spatial. First, Allen created an image with the Midjourney generative AI program using a series of prompts. Second, Allen used Adobe Photoshop to “beautify and adjust various cosmetic details/flaws/artifacts, etc.” in the Midjourney image. Third and finally, Allen enlarged the image using Gigapixel AI. This final step was not relevant to the Copyright Office proceeding since Allen conceded that Gigapixel AI step did not introduce new original elements to the work, and that “the enlargement process undertaken by Gigapixel AI does not equate to authorship.”

## Allen's Arguments and the Copyright Office Ruling

### Do Prompts Constitute Sufficient Human Authorship

Allen argued that the Copyright Office ignored the type and amount of human creativity required to formulate a prompt when generating a work using Midjourney. Allen noted that he attempted 624 prompts before arriving at the final image, which equated to creative input in the work. Specifically, he noted that these prompts included notations about “the overall image’s genre and category,” “certain professional artistic terms which direct the tone of the piece,” “how lifelike [he] wanted the piece to appear,” a description of “how colors [should be] used,” a description “to further define the composition,” “terms about what style/era the artwork should depict,” and “a writing technique that [Allen] has established from extensive testing” that would make the image “pop.” It is difficult to assess how these descriptors translated into Allen’s actual prompt because he deemed the specific prompt to be confidential and would not disclose it.

The Copyright Office rejected Allen’s “prompt” argument. It reiterated a point that it made in its decision on the “Zarya of the Dawn” application; namely, that “Midjourney does not understand grammar, sentence structure, or words like humans,” and therefore does not “interpret prompts as specific instructions to create a particular expressive result.” In the Copyright Office’s view, this explains the need for Allen to use over 600 prompts until he generated an image that reflected his desired result.

Quoting its March 2023 AI Guidance, the office stated, “when an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the ‘traditional elements of authorship’ are determined and executed by the technology — not the human user.” The office analogized the use of prompts to *Kelley v. Chicago Park District*, 635 F.3d 290 (7th Cir. 2011), in which an artist sought to register a copyright in a wildflower display he had planted. In that case, the Seventh Circuit held that, while the artist determined the initial arrangement of the

plants, such arrangement is insufficient “authorship” required for copyright protection since “natural forces — not the intellect of the gardener — determine [the plants’] form, growth, and appearance.”

The Copyright Office acknowledged, as it has in the past, that prompts could be creative, including to the point that the prompt itself could be registered as a copyright, but this does not necessarily mean there is sufficient human involvement in the output that is generated.

### Does the Copyright Office Position Create a ‘Void of Ownership’

Allen argued that, in refusing to register AI-generated works, the Copyright Office is placing “a value judgment” on the utility of various AI tools, and that denying copyright protection for the output of such AI tools would result in “a void of ownership.”

The Copyright Office rejected this argument, stating that the Constitution and the Copyright Act set limits on the types of works that can be protected by copyright, and the fact that not all works will qualify for copyright protection does not create a void of ownership. The office similarly rejected Allen’s assertion that the office was making a “value judgment,” because its position was merely a recognition that human authorship is a “bedrock requirement of copyright.”

### Application of the Fair Use Doctrine

Allen argued that the fair use doctrine was relevant to the question of copyrightability since the underlying AI-generated work was merely “raw material” that he had transformed through his artistic contributions, and therefore, “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.”

The Copyright Office rejected this argument as well, stating that the fair use doctrine is not relevant to the question of copyrightability. The office also noted that, to the extent Allen was arguing, by analogy, that he had “transformed” the AI-generated work, nothing prevented him from registering his human-authored elements as long as he disclaimed the elements that were AI generated, an option Allen refused to accept.

### The Disclosure of AI-Elements Is Unduly Burdensome

Finally, Allen argued that it would be unduly burdensome to require creators to disclose the AI tools they used and what proportion of the work was created with that tool. The Copyright Office dismissed this characterization of its AI Guidance, noting that its guidance only requires applicants to provide a “brief statement” that AI was used, without any need to specify the tool(s) used or the proportion

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of the work that was AI-generated. (See our August 2, 2023, client alert, [“Copyright Office Provides Guidance on the Registration of Works That Include AI-Generated Material,”](#) for more information on the guidance provided by the Copyright Office).

## Key Points

The Copyright Office’s rejection of Allen’s “Théâtre D’opéra Spatial” application provides future copyright applicants with

additional insight into how the office is evaluating works that include AI-generated elements. However, the fact pattern here was somewhat unique in that Allen refused the opportunity to acknowledge in his application that the work contained AI-generated elements and to disclaim those elements in his application. We expect that, going forward, the Copyright Office will face tougher questions on the scope of copyrightability for works containing AI-generated elements.