

COPYRIGHT ELIGIBILITY FOR AI-GENERATED IMAGES: THE THRESHOLD OF HUMAN CREATIVITY

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Abstract

Generative artificial intelligence (AI) has the potential to unleash the creativity of the human soul. AI programs generally respond to human prompts to create text, images, code, videos, and more. Like photography in the 1800s, generative AI is a new technology presenting new questions for copyright law. However, the United States Copyright Office has taken a stand against granting copyright protections to generative AI-created images. Using established case law, this Note argues that in a scenario wherein an author visualizes an image, refines a text prompt, and uses generative AI to subsequently create an image matching the author's visualization, the image should be protected by copyright law. Not only is the use of generative AI akin to taking a picture, but visualizing an image and using AI to create that image requires more creativity than simply snapping a picture. Furthermore, this Note argues that images created by humans through the use of generative AI are closely related to copyrightable works that involved revelations from divine beings. Although generative AI technology and software is understood by those who have created it, there is almost no difference—aside from belief—between asking a divine being to answer questions that will be placed in a book and asking generative AI to generate an image. Moreover, this Note argues that the benefit of inspiring creativity outweighs any potential disadvantages. Ultimately, when a human envisions a creation, asks generative AI to display that creation, and the human edits or otherwise organizes the work, the minimum level of human creativity has been met. Images generated in such a way should be protected by copyright.

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INTRODUCTION

Human beings have dreams. Even dogs have dreams, but not you. You are just a machine. An imitation of life. Can a robot write a symphony? Can a robot turn a canvas into a beautiful masterpiece?

Can you?

—Detective Del Spooner and the robot, Sonny
(*I, Robot*, 2004).¹

The day has come where robots can, as directed by humans, “write a symphony” or “turn a canvas into a beautiful masterpiece.”² This is accomplished through generative artificial intelligence (AI). Generative AI includes “machine learning systems capable of generating text, images, code, or other types of content, often in response to a prompt entered by a user.”³ These AI tools are trained, often by feeding examples to the AI model that the generative AI can then learn from and emulate.⁴ One of the more popular generative AI tools is called ChatGPT.⁵ In the summer of 2023, ChatGPT made legal headlines because a lawyer used it to write a brief and did not catch that ChatGPT cited to made-up case law.⁶ While ChatGPT focuses on textual outputs, generative AIs such as DALL-E, Midjourney, and Stable Diffusion focus on visual outputs.⁷ Given the variety of possible outputs,⁸ the potential for generative AI seems almost limitless.

1. *I, ROBOT* (20th Century Fox 2004).

2. *Id.*; see also Stephen Ornes, *Computers are Changing How Art is Made*, SCI. NEWS EXPLORES (Nov. 12, 2020), <https://www.snexplores.org/article/computers-are-changing-how-art-is-made> (reporting how AI programs can generate artwork and melodies).

3. Owen Hughes, *Generative AI Defined: How it Works, Benefits and Dangers*, TECH REPUBLIC (Aug. 7, 2023), <https://www.techrepublic.com/article/what-is-generative-ai/>.

4. See *id.* (explaining how generative AI analyzes large amounts of data “to create new, convincing outputs”).

5. See Ben Dickson, *What is ChatGPT? A Basic Explainer*, PCMAG (June 5, 2023), <https://www.pcmag.com/how-to/what-is-chatgpt-a-basic-explainer>.

6. See Ramishah Muruf, *Lawyer Apologizes for Fake Court Citations from ChatGPT*, CNN (May 28, 2023), <https://www.cnn.com/2023/05/27/business/chat-gpt-avianca-mata-lawyers/index.html>.

7. Hughes, *supra* note 3.

8. For example, ChatGPT can be used to debug and write code, draft emails, plan vacations, “[t]roubleshoot why your grill won’t start,” and analyze data and graphs for work. *ChatGPT*, OPENAI, <https://openai.com/chatgpt> (last visited Feb. 29, 2024). Using DALL-E,

The potential of generative AI as a new technology capable of creating stories or images has created significant questions that test current copyright law.⁹ In fact, the United States (U.S.) Copyright Office has been “receiving and examining applications for registrations that claim copyright in AI-generated material.”¹⁰ However, like the fictional Detective Del Spooner in the film *I, Robot*, the U.S. Copyright Office is skeptical of anything to do with non-humans.¹¹ Under current law, as interpreted by the Copyright Office, AI-generated creations by authors—or “works”¹²—are generally ineligible for copyright protection.¹³ However, several questions remain unanswered.

These unanswered questions generally concern how the law should treat AI-generated works.¹⁴ Because generative AI functions by being trained on potentially copyrighted material, there is a question of whether the images used to train generative AI are being copied in violation of copyright law, or if such training is a fair use.¹⁵ There is also a question about whether AI-generated images are infringing derivative works.¹⁶ Additionally, because generative AI has the ability to generate works in the style of artists, both living and dead, there are questions that arise concerning name and likeness.¹⁷ Scholars have attempted to answer who should own the copyright if AI-generated works are

individuals can create business logos, artwork, and comic strips, likely impacting the digital art industry. *See id.*

9. *E.g.*, Thaler v. Perlmutter, No. CV 22-1564 (BAH), 2023 U.S. Dist. LEXIS 145823, at *1–2 (D.D.C. Aug. 18, 2023) (denying copyright protections for a work where AI is listed as the author).

10. Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16191 (Mar. 16, 2023) [hereinafter USCO AI Policy].

11. *Id.*; *see also* I, ROBOT, *supra* note 1.

12. *What is Copyright?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/what-is-copyright/> (last visited Feb. 29, 2024).

13. *See* USCO AI Policy, *supra* note 10, at 3.

14. Letter from Thom Thillis & Chris Coons, U.S. Senators, to Kathi Vidal, Dir. of the U.S. Patent and Trademark Off., and Shira Perlmutter, Dir. of U.S. Copyright Off., 1 (Oct. 27, 2022), <https://www.copyright.gov/laws/hearings/Letter-to-USPTO-USCO-on-National-Commission-on-AI-1.pdf> (asking “what the law should be”) [hereinafter “Letter from Senators”].

15. CHRISTOPHER ZIRPOLI, CONG. RSCH. SERV., LSB10922, GENERATIVE ARTIFICIAL INTELLIGENCE AND COPYRIGHT LAW 3 (2023).

16. *See id.* at 4–5.

17. *See id.* at 5.

copyrightable.¹⁸ The biggest unanswered question,¹⁹ and the focus of this Note, is how much human input or control is needed to make a work created by a human using generative AI eligible for copyright protection, particularly when it comes to images.

If a work is visualized by a human prior to creation using generative AI and if the prompt is refined to match the human author's visualization, the entire work should be protected by copyright. This is because case law supports such a standard.²⁰ Humans already direct machines to create other creative works that are protected by copyright,²¹ and the policy of copyright laws supports protecting the human creativity²² required to generate an image in this manner.²³ Based on such existing parallels, this Note argues that works visualized by humans and generated by AI should be eligible for copyright protection.

To support this standard, Part I of this Note provides an overview of how generative AI functions, including illustrative examples. Next, Part II discusses the current state of copyright law as it relates to generative AI. Part III explains

18. See generally Gia Jung, *Do Androids Dream of Copyright?: Examining AI Copyright Ownership*, 35 BERKELEY TECH. L.J. 1151 (2020).

19. The “baseline question is whether or not AI or AI assisted works” are eligible for copyright protection. Michael Kasdan & Brian Pattengale, *A Look at Future AI Questions for the US Copyright Office*, LAW360 (Nov. 10, 2022), <https://www.lexisnexis.com/pdf/practical-guidance/ai/a-look-future-ai-questions-for-us-copyright-office.pdf>. Even though the U.S. Copyright Office has taken a stance against protecting works created using generative AI, the Copyright Office's decision is “merely one jumping off point.” *Id.* In large part, this issue remains unsettled because federal courts do not have to “adopt the office's interpretations of the Copyright Act.” ZIRPOLI, *supra* note 15, at 2–3.

20. See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 364 (1991) (explaining that it is human creativity, i.e., originality, and not labor that is protected by copyright law); see also *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (noting that copyright law protects “the fruits of intellectual labor” that “are founded in the creative powers of the mind”); see also *infra* Part IV (discussing various cases where copyright protected works created by or with the assistance of non-humans).

21. See *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 60 (1884) (holding that photographs created by a camera are eligible for copyright protection).

22. Creativity as used here means the “original expression” discussed in *Feist*, 499 U.S. at 349, and the “original intellectual conceptions of the author” discussed in *Burrow-Giles*, 111 U.S. at 58. To be protectable, a work only needs a minimum “level of creativity that is extremely low.” *Feist*, 499 U.S. at 345. Even a phone book can be protected by copyright if the selection and arrangement of facts are more creative than listing subscriber information in alphabetical order. See *id.* at 362–63.

23. The purpose of copyright law is to promote creativity by protecting “original expression” and “encourag[ing] others to build freely upon the ideas and information conveyed by a work.” *Feist*, 499 U.S. at 349–50. Because it is creativity, not labor, that is protected, it does not matter whether a human uses generative AI to create a work if the creative spark originates with the human author. See *id.* at 364.

the U.S. Copyright Office's recent *Zarya of the Dawn* decision regarding a human author's use of generative AI to generate images as part of a comic. Part IV explores prior cases regarding granted copyright protection to works created with the assistance of, and sometimes almost entirely by, non-human sources. Finally, Part V applies case law to *Zarya of the Dawn* and addresses the advantages and disadvantages of this Note's proposed standard.

I. BACKGROUND ON GENERATIVE AI

A. *Mechanics*

While there are many different types of generative AI, they are based on the same principles. In the creation stage, “[g]enerative AI models typically rely on a user feeding it a prompt that guides it towards producing a desired output.”²⁴ These generative AI models have two distinct phases: first, “the training of a ‘model,’” and second, “using the ‘model’ to make new outputs,” like images.²⁵

1. Training Generative AI Models

Training generative AI has been compared to the education of a law student.²⁶ In law school, students are usually taught by reading cases and being asked questions about the cases by professors using the Socratic method.²⁷ Then, when a student takes an exam, successful students apply the correct principles to the exam questions “even though the student was never *explicitly* taught which principles to use.”²⁸ These models are trained following the same basic steps: “*receive* an example; *predict* the relationship between the different elements of the example; *check* the result, and *adjust* to improve future predictions.”²⁹ In the context of image generation, generative AI is thus trained “by exposing [the generative AI] to large amounts of data.”³⁰

While these models are fed copious amounts of data, generative AI is not able to create new outputs simply by recalling from memory various bits of data that the program has reviewed.³¹ In reality, “the model has extracted correlations

24. Hughes, *supra* note 3.

25. Van Lindberg, *Building and Using Generative Models Under US Copyright Law*, 18 RUTGERS BUS. L. REV. 1, 4 (2023).

26. *See id.* at 6–8.

27. *Id.* at 6–7.

28. *Id.* at 7.

29. *Id.* at 7–8.

30. ZIRPOLI, *supra* note 15, at 3.

31. Lindberg, *supra* note 25, at 13.

that, to humans, resemble certain artistic styles.”³² Like the law student who masters legal principles and applies them to a new fact pattern, generative AI figures out which principles humans use to create or assess creative works and then applies those principles, in response to human input, to generate new content.³³

2. Using Generative AI Models to Produce New Outputs

Once a generative AI model has been trained, it is ready to produce new outputs. Generative AI generates outputs, such as images, by predicting what the output should be—based on the model’s training and the input provided.³⁴ When generating new content, a generative AI model “relies on the statistical patterns learned from the training data to create a predicted output.”³⁵ These outputs are generally “of the same type as the inputs,” but “there is no inherent restriction” keeping a generative AI model from generating an output different than the input—such as creating an image from text.³⁶ The point of these AI models is to use large amounts of data to be able to predict and generate the desired output based on a given input.³⁷ In essence, generative AI models based on “diffusion” start with a field of “noise” that is then eliminated until the output matches the predicted output, based on the text prompt.³⁸ Although there may seem to be an element of randomness to diffusion-based AI generation, the output is actually not random.³⁹ This is because generative AI requires a human to “describe[] what should be generated” and otherwise “initialize and guide the generative process” through the use of prompts.⁴⁰

B. Examples of Works Created by Generative AI

One author on LinkedIn experimented with DALL-E 2⁴¹ to create works of art. The author visualized an image, described it to the AI, and then reviewed the

32. *Id.*

33. *Id.* at 20.

34. *Id.* at 18–19.

35. *Id.* at 20.

36. *Id.* at 19.

37. *Id.* at 7–8.

38. Rachel Gordon, *3 Questions: How AI Image Generators Work*, MIT CSAIL (Oct. 27, 2022), <https://www.csail.mit.edu/news/3-questions-how-ai-image-generators-work>.

39. Lindberg, *supra* note 25, at *22.

40. *Id.*

41. See *DALL-E2*, OPENAI, <https://openai.com/dall-e-2> (last visited Feb. 29, 2024) [hereinafter *DALL-E2*] (showing an improved version of DALL-E).

resulting outputs.⁴² In particular, this author used the text prompt “[s]how an image of a 1 year old baby girl feeding a treat to a small Yorkie Dog.”⁴³ Below are some of the images generated by this prompt:⁴⁴



But this is not the only way to generate an image. Artists can also give generative AI a base image to work from. An example from artist Kris Kashtanova is shown below:⁴⁵



42. Eric Perez, *Digital Da Vinci: The Evolution of Art in the Age of AI*, LINKEDIN (Aug. 11, 2023), <https://www.linkedin.com/pulse/digital-da-vinci-evolution-art-age-ai-eric-perez>.

43. *Id.*

44. *Id.*

45. Tom Hals & Blake Brittain, *Insight: Humans vs. Machines: The Fight to Copyright AI Art*, REUTERS (Apr. 1, 2023), <https://www.reuters.com/default/humans-vs-machines-fight-copyright-ai-art-2023-04-01/>.

The image on the left is the artist's sketch. This sketch was fed into a generative AI model known as "Stable Diffusion."⁴⁶ The image on the right is the output from Stable Diffusion after combining the artist's original sketch with a text prompt.⁴⁷ As generative AI advances, the methods available to generate images will likely change as well.⁴⁸

Since this technology is in its infancy,⁴⁹ there are still issues to be worked out. One such problem is that generative AI models do not always generate images that match the descriptions given to the model.⁵⁰ As an example, many of the models, when asked to generate "a horse riding an astronaut," will still "generate[] a person riding a horse" because of the data the models have been trained on.⁵¹ In other words, the AI model does not expect to see a horse riding a person, so it eliminates that possibility from the output. This shortcoming elucidates the difficulty that artists may have when using generative AI as a tool to create images. To address these issues, researchers seek to have multiple generative AIs work together on projects with each AI focusing on one aspect of the project.⁵² This development will likely take time.⁵³

Even with the limitations inherent in new technology, generative AI possesses vast potential for unleashing human creativity.⁵⁴ Unfortunately, current copyright law puts human-created generative AI works into the public domain and thus does not formally recognize or protect such creativity.

46. *Id.*

47. *Id.*

48. *See* Kasdan & Pattengale, *supra* note 19.

49. *See* Hughes, *supra* note 3 (discussing the explosive popularity of generative AI in 2023 and rapid advancement in the technology).

50. Gordon, *supra* note 38.

51. *Id.*

52. *Id.*

53. Peter Bendor-Samuel, *Key Issues Affecting the Effectiveness of Generative AI*, FORBES (Dec. 5, 2023), <https://www.forbes.com/sites/peterbendorsamuel/2023/12/05/key-issues-affecting-the-effectiveness-of-generative-ai/?sh=18159274519c> (noting the frantic experimentation that has taken place over the last year and the thousands of pilot tests conducted).

54. With the advent of generative AI, individuals who can visualize a scene in great detail, but lack the artistic aptitude to transfer that visualization to paper, can use generative AI to create a work depicting the scene they have visualized. *See* Sarah Shaffi, 'It's The Opposite of Art': Why Illustrators are Furious about AI, GUARDIAN (Jan. 23, 2023), <https://www.theguardian.com/artanddesign/2023/jan/23/its-the-opposite-of-art-why-illustrators-are-furious-about-ai>.

II. CURRENT COPYRIGHT LAW AND POLICY

Under current copyright law, as interpreted by the U.S. Copyright Office, works created using generative AI are ineligible for copyright protection.⁵⁵ The question of what to do with works created either wholly or in part by generative AI has piqued the interest of the federal government. For example, North Carolina Senator Thom Tillis and Delaware Senator Chris Coons co-wrote a letter to the U.S. Patent and Trademark Office and the U.S. Copyright Office asking the agencies to form “a national commission on AI.”⁵⁶ In particular, the senators are “interested in what the law should be.”⁵⁷ In March 2023, and in response to the rising number of submissions generated at least in part by AI, the Copyright Office issued guidance for AI-generated works.⁵⁸

A. *Copyright Office AI Policy Guidance*

In addition to the standard requirement that only “original works of authorship fixed in any tangible medium of expression” are eligible for copyright protection,⁵⁹ the U.S. Copyright Office has issued additional rules for works created by non-humans. To be eligible for copyright protection, “a work must be created by a human being.”⁶⁰ Accordingly, the “Copyright Office will not register works produced by nature, animals,” plants, or divine or supernatural beings.⁶¹ However, if divine spirits are claimed to have inspired the work, that work is eligible for registration.⁶²

Concerning works created using software like generative AI, the Copyright Office stated that works created by machines “without any creative input or intervention from a human author” are ineligible for copyright protection.⁶³ The question at the core of this standard is whether a work was created by a human directing the computer as a tool, or whether the computer came up with “the traditional elements of authorship” and ultimately directed the creative process.⁶⁴

55. See USCO AI Policy, *supra* note 10, at 16191–92 (discussing how one such “work could not be registered because it was made ‘without any creative contribution from a human actor’”).

56. Letter from Senators, *supra* note 14.

57. *Id.*

58. See generally USCO AI Policy, *supra* note 10.

59. 17 U.S.C. § 102(a).

60. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT PRACTICES § 313.2 (3d ed. 2021) [hereinafter COMPENDIUM].

61. *Id.*

62. See *id.*

63. *Id.*

64. *Id.*

As a result, the Copyright Office requires any works containing more than a de minimis use of generative AI to “be explicitly excluded from the application.”⁶⁵ Unfortunately, the Copyright Office does not explain what constitutes a “de minimis” use of AI. However, the Copyright Office’s *Compendium* clarifies that works made solely by humans are favored and works created using generative AI are disfavored.⁶⁶

The Copyright Office asserts that the copyright statute and case law support a finding that only works authored by humans are eligible for copyright protection.⁶⁷ This is even though the statute itself never mentions that copyright protections only extend to works authored by humans.⁶⁸ For example, 17 U.S.C. § 102(a) states that “copyright protection subsists, in accordance with this title, in original works of authorship.”⁶⁹ Section 102(b) continues and states that copyright protection does not extend to ideas “regardless of the form in which it is described, explained, illustrated, or embodied.”⁷⁰ Because the statute does not explicitly require human authorship, the requirement is merely a policy preference established by the Copyright Office. Copyright law is meant to protect “the fruits of intellectual labor” that “are founded in the creative powers of the mind.”⁷¹ The impact of the Copyright Office’s guidance is that works that are created by humans using generative AI are currently entitled to no copyright protection and “enter the public domain upon creation, free for anyone to use and distribute.”⁷²

B. *The Creativity Standard*

To be an “original work of authorship” eligible for copyright protection, the work must be independently created,⁷³ and the work must have a modicum of

65. USCO AI Policy, *supra* note 10, at 16193.

66. See COMPENDIUM, *supra* note 60.

67. Letter from Robert J. Kasunic, Assoc. Reg. of Copyrights & Dir. of the Off. of Pol’y & Prac., U.S. Copyright Off. to Van Lindberg, Taylor English Duma LLP 14 (Feb. 21, 2023), <https://www.copyright.gov/docs/zarya-of-the-dawn.pdf> (*Zarya of the Dawn* copyright registration decision, Registration #VAu001480196) [hereinafter “Zarya Letter”].

68. See 17 U.S.C. § 102.

69. *Id.* § 102(a).

70. *Id.* § 102(b).

71. *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

72. Nina I. Brown, *Artificial Authors: A Case for Copyright in Computer-Generated Works*, 20 COLUM. SCI. & TECH. L. REV. 1, 5 (2018).

73. This Note does not spend much time on the independent creation element because AI models are not concerned with copying works. Thus, the independent creation element is not at issue. See discussion *supra* Section I.

creativity.⁷⁴ The barest amount of creativity is required for a work to be creative. For example, courts have found that organizing a phone book has the potential to be sufficiently creative.⁷⁵ The preeminent case on the level of human creativity required for a work to be eligible for copyright protections is *Feist Publications, Inc. v. Rural Telephone Service Co. (Feist)*,⁷⁶ wherein the U.S. Supreme Court sought to “clarify the extent of copyright protection available to telephone directory white pages.”⁷⁷ The defendant, Feist Publications, Inc. (Feist), had licensed parts of its phone directory from ten other phone companies, but the plaintiff, Rural Telephone Service Company (Rural), refused to license its directory to Feist.⁷⁸ Unable to get these listings, Feist copied Rural’s phonebook.⁷⁹ Thereafter, “Rural sued [Feist] for copyright infringement.”⁸⁰ Feist countered that “the information copied [from the phonebook] was beyond the scope of copyright protection.”⁸¹

To determine if Rural’s phonebook was eligible for copyright protection, the Supreme Court assessed whether Rural’s phonebook met the legal requirement for originality.⁸² In addressing this issue, the Court stated that “[t]he *sine qua non*,” or indispensable element, “of copyright is originality.”⁸³ Originality just requires that the work is “independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”⁸⁴ The creativity required “is extremely low; even a slight amount will suffice.”⁸⁵ Further, copyright protection is not barred even if two authors independently come up with the exact same work, as long “as the similarity is fortuitous, not the result of copying.”⁸⁶

To illustrate the creativity requirement, the Court discussed the difference in copyright law between facts and factual compilations. Facts cannot be copyrighted because they “do not owe their origin to an act of authorship.”⁸⁷ The

74. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

75. *See id.* at 349.

76. Zarya Letter, *supra* note 67, at 3.

77. *Feist*, 499 U.S. at 342.

78. *Id.* at 342–43.

79. *See id.* at 343.

80. *Id.* at 344.

81. *Id.*

82. *Id.* at 361.

83. *Id.* at 345 (emphasis in original).

84. *Id.* (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHTS § 2.01 (1990)).

85. *Id.*

86. *Id.* (citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936)).

87. *Id.* at 347.

distinction between facts and factual compilations thus lies in the difference between creation and discovery.⁸⁸ The creativity requirement is consistent with the policy behind copyright protection because “[t]he primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts.’”⁸⁹ Copyright law “encourages others to build freely upon the ideas and information conveyed by a work” by being creative.⁹⁰ Because copyright law protects creativity and not labor, it was not enough that Rural expended many hours collecting the phone numbers and addresses that made up their telephone directory.⁹¹

The facts comprising Rural’s phonebook were ineligible for copyright protection because the “selection coordination, and arrangement” of the facts failed to meet the minimum creative standard for copyright protection.⁹² The decision to include each individual’s “name, town, and telephone number” in the telephone directory lacked the “modicum of creativity necessary to transform mere selection into copyrightable expression” because the decision of what to include was so obvious.⁹³ Alternatively, the Court notes that the directory lacked creativity because the inclusion of names and telephone numbers was “dictated by state law, not by Rural.”⁹⁴ Furthermore, Rural’s “coordination and arrangement of facts” was not sufficiently creative because arranging the names found in the directory by alphabetical order “is an age-old practice” that is “expected as a matter of course.”⁹⁵ “Rural’s white pages, limited to basic subscriber information and arranged alphabetically,” thus failed to “possess more than a *de minimis* quantum of creativity.”⁹⁶ Accordingly, plaintiff Rural’s phone directory was ineligible for copyright protection and Feist could not have infringed any copyright.⁹⁷

When determining whether AI-generated images are eligible for copyright protection, the U.S. Copyright Office takes into consideration how generative AI works, current policy, and the creativity standard discussed in *Feist*.⁹⁸ The next Part discusses how the Copyright Office used these points to determine that

88. *Id.*

89. *Id.* at 349.

90. *Id.* at 350.

91. *Id.* at 361.

92. *Id.* at 362.

93. *Id.*

94. *Id.* at 363.

95. *Id.*

96. *Id.*

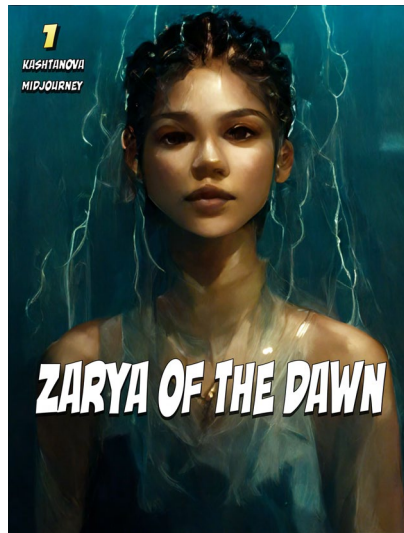
97. *Id.* at 364.

98. *See generally* Zarya Letter, *supra* note 67.

images in a comic book generated by AI with human direction were ineligible for copyright protection.

III. ZARYA OF THE DAWN

Zarya of the Dawn (*Zarya*) is one of the most recent examples of the U.S. Copyright Office's reaction to works created by a human artist using generative AI.⁹⁹ Artist Kris Kashtanova created *Zarya of the Dawn* using the generative AI software Midjourney.¹⁰⁰ *Zarya of the Dawn* is a comic book describing "the voyage of a young person through several futuristic worlds."¹⁰¹



Zarya stands in stark contrast to cases like *Thaler v. Perlmutter*.¹⁰² In *Thaler*, the plaintiff argued that the generative AI model was the author, not a human.¹⁰³ The district court correctly rejected this argument on summary judgment and agreed that copyright law protects human creativity.¹⁰⁴ As a result, the human

99. *See id.* at 1.

100. *See id.* This Note refers to the U.S. Copyright Office's decision as *Zarya*, and to the comic book work by its full title, *Zarya of the Dawn*.

101. James Hookway, *AI-Generated Comic Book 'Zarya of the Dawn' Keeps Copyright but Key Images Excluded*, WALL ST. J. (Feb. 24, 2023), <https://www.wsj.com/articles/ai-generated-comic-book-zarya-of-the-dawn-keeps-copyright-but-key-images-excluded-c8094509>.

102. No. CV 22-1564 (BAH), 2023 U.S. Dist. LEXIS 145823 (D.D.C. Aug. 18, 2023).

103. *Id.* at *3.

104. *Id.* at *2.

authorship requirement still stands.¹⁰⁵ Unlike *Thaler*, where the plaintiff claimed authorship by generative AI, *Zarya* involved an authorship claim by a human who created a work using generative AI as a tool.¹⁰⁶

Initially, *Zarya of the Dawn* was granted a copyright registration in September 2022.¹⁰⁷ Originally filed as visual art, *Zarya of the Dawn* was re-registered as a textual work after the registration was cancelled.¹⁰⁸ If not for questions from reporters, the Copyright Office never would have known that Kashtanova used generative AI to help create the pictures.¹⁰⁹

Each image found in *Zarya of the Dawn* was created “using a similar creative process.”¹¹⁰ Kashtanova first gave the “core creative input” to the images created by entering a text prompt into the generative AI.¹¹¹ After viewing the various outputs generated by the AI, she picked one or more image to focus on and then further refined the prompt to create the final image.¹¹² Importantly, generating the final image was “a process of trial-and-error, in which she provided ‘hundreds or thousands of descriptive prompts’ to” the generative AI until the output was “as perfect a rendition of her vision as possible.”¹¹³ In two instances, Kashtanova also used photo-editing software to further refine the images.¹¹⁴

The Copyright Office viewed this trial and error process as evidence that Kashtanova was not the creative force behind the images of *Zarya of the Dawn*.¹¹⁵ The Copyright Office held that because the AI “generates images in an unpredictable way,” Kashtanova could not be the author of the images.¹¹⁶ Furthermore, her edits to the two images in the comic book lacked a “sufficient amount of original authorship” to be eligible for copyright protection.¹¹⁷ To be fair, the edits were minor and included refinements such as touching up a lip.¹¹⁸

Ultimately, the Copyright Office concluded that the AI-generated images “could not be protected by copyright,” even though the work as a whole included

105. *Id.*

106. Compare Zarya Letter, *supra* note 67, at 17, with *Thaler*, 2023 U.S. Dist. LEXIS 145823, at *2–3.

107. See Zarya Letter, *supra* note 67, at 1.

108. *Id.*

109. See *id.* at 4.

110. *Id.* at 8.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 10.

115. *Id.* at 9.

116. *Id.*

117. *Id.* at 11.

118. *Id.* at 10–11.

text written by a human and Kashtanova provided the creative spark for all of the included images.¹¹⁹ The Copyright Office reached this conclusion because of the “significant distance between what a user may direct [the generative AI] to create and the visual material [the generative AI] actually produces.”¹²⁰ As a result, it is fair to say that under the current interpretation of copyright law any work generated using AI and requiring no more work than entering text prompts will likely be rejected as not being authored by a human. The Copyright Office stated the rule that “[w]hen an AI technology determines the expressive elements of its output, the generated material is not the product of human authorship.”¹²¹ As Part IV discusses next, the Copyright Office briefly addressed two previous cases in its analysis.¹²² Although not discussed by the Copyright Office, this Note also discusses a third case based on its important holding that even when a non-human entity provides the substance of the work and has final say over any changes to the work, there is enough human creativity to protect the work under copyright law.¹²³ Building upon such analysis, Part V argues that the Copyright Office’s analysis is ultimately inconsistent with prior case law.¹²⁴

IV. ANALOGOUS CASES

A. Burrow-Giles Lithographic Co. v. Sarony

Burrow-Giles Lithographic Co. v. Sarony (*Burrow-Giles*)¹²⁵ is the first time the U.S. Supreme Court grappled with the effects of technological advances on copyright law.¹²⁶ In this case, the Supreme Court sought to resolve the question of whether photographs taken by a human, but created by a camera, were eligible for copyright protection.¹²⁷

The procedural history of the case is simple. A photographer, Napoleon Sarony, filed suit against the defendant, Burrow-Giles Lithographic Company (*Burrow-Giles*), for violating Sarony’s copyright.¹²⁸ The copyrighted work was

119. USCO AI Policy, *supra* note 10, at 16191.

120. Zarya Letter, *supra* note 67, at 9.

121. USCO AI Policy, *supra* note 10, at 16192.

122. Zarya Letter, *supra* note 67, at 9.

123. *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, No. 96 Civ. 4126 (RWS), 2000 U.S. Dist. LEXIS 10394, at *33–34 (S.D.N.Y. July 25, 2000).

124. *See infra* Part V.

125. 111 U.S. 53 (1884).

126. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

127. *See id.* at 55.

128. *Id.* at 54–55.

a photograph entitled “Oscar Wilde No. 18.”¹²⁹ A copy of the image at issue is shown here:¹³⁰



The lower court entered judgment in favor of Sarony.¹³¹ Burrow-Giles appealed the judgment to the Supreme Court, arguing that Congress did not have “the constitutional right to protect photographs and negatives thereof by copyright.”¹³² The basis for defendant’s argument was that “a photograph is not a writing nor the production of an author.”¹³³ Specifically, the argument was that because a photograph is a “reproduction on paper of the exact features of some natural object,” photographs are not created by the author.¹³⁴ Burrow-Giles thus argued that the photographic process was “merely mechanical, with no place for novelty, invention, or originality.”¹³⁵

In determining whether or not a photographer is an author, the Supreme Court noted the history of copyright protections in the United States.¹³⁶ The Court noted that the first copyright statute enacted by Congress “not only makes

129. *Id.* at 54.

130. Photograph of Oscar Wilde No. 18, in Mitch Tuchman, *Supremely Wilde*, *Smithsonian Mag.*, (May 2004), <https://www.smithsonianmag.com/arts-culture/supremely-wilde-99998178/>.

131. *Burrow-Giles*, 111 U.S. at 54.

132. *Id.* at 55.

133. *Id.* at 56.

134. *Id.*

135. *Id.* at 59.

136. *See id.* at 56–57 (discussing the importance of maps and charts being part of the first law governing copyrights because maps and charts are reproductions of naturally occurring objects).

maps and charts subjects of copyright, but mentions them before books in the order of designation.”¹³⁷ Because maps and charts are “reproductions on paper of the exact features of some natural object,”¹³⁸ photographs can also be subject to copyright.¹³⁹ In fact, the “only reason why photographs were not included in the extended list in the act of 1802 is probably that they did not exist.”¹⁴⁰ Indeed, “the scientific principle on which [photography] rests, and the chemicals and machinery by which it is operated, have all been discovered long since that statute was enacted.”¹⁴¹ However, the Court did not stop there. The Court instead sought to answer what an author is. Noting that the term “author” is “susceptible of a more enlarged definition,” the Court defined an author as “he to whom anything owes its origin.”¹⁴²

Ultimately the Supreme Court affirmed the circuit court judgment.¹⁴³ The key requirement for any works that an author seeks to have protected by copyright is that the works are “representatives of original intellectual conceptions of the author.”¹⁴⁴ Thus, photographs are eligible for copyright protection, despite the mechanical process involved, because the photographer poses the subject, chooses the background, and selects what to include in the picture.¹⁴⁵ Photographs, although generated through mechanical means, are thus “the product of plaintiff’s intellectual invention.”¹⁴⁶

B. *Urantia Foundation v. Maaherra*

An interesting subset of copyright cases has arisen concerning divinely inspired works, sometimes called “psychography.”¹⁴⁷ In *Urantia Foundation v. Maaherra (Urantia)*,¹⁴⁸ the Ninth Circuit discussed whether *The Urantia Book*, a book “authored by celestial beings and transcribed, compiled, and collected by

137. *Id.* at 57.

138. *See id.* at 56.

139. *Id.* at 57–58.

140. *Id.* at 58.

141. *Id.*

142. *Id.* at 57–58.

143. *Id.* at 61.

144. *Id.* at 58.

145. *See id.* at 60.

146. *See id.*

147. Jung, *supra* note 18, at 1161.

148. 114 F.3d 955 (9th Cir. 1997).

mere mortals,” was eligible for copyright protections.¹⁴⁹ The court held that it was.¹⁵⁰

The origin of *The Urantia Book* is as follows. Both parties believed *The Urantia Book* to be authored by “spiritual beings described in terms such as the Divine Counselor, the Chief of the Corps of Superuniverse Personalities, and the Chief of the Archangels of Nebadon.”¹⁵¹ These divine beings passed on the message ultimately compiled into *The Urantia Book* through Dr. William Sadler, “a patient of a Chicago psychiatrist.”¹⁵² To propagate the messages received from these divine beings, Dr. Sadler gathered followers.¹⁵³ After some time, Dr. Sadler and his followers began asking the divine beings specific questions.¹⁵⁴ The answers to these questions were compiled and arranged into *The Urantia Book*.¹⁵⁵

In 1991, the plaintiff, Urantia Foundation, filed a copyright infringement suit against defendant Kristen Maaherra. Maaherra was a zealous fan of *The Urantia Book* who distributed a “study aid that included the entire text of the Book.”¹⁵⁶ Although Maaherra conceded that she copied *The Urantia Book*, she argued there was no copyright infringement. Maaherra’s key argument was that *The Urantia Book* “lack[ed] the requisite ingredient of human creativity” because it was based on divine revelation.¹⁵⁷ Although the Ninth Circuit agreed with Maaherra that “it is not creations of divine beings that the copyright laws were intended to protect,” the court also noted that the “copyright laws, of course, do not expressly require ‘human’ authorship.”¹⁵⁸

In this case, “the human selection and arrangement of the revelations . . . could not have been so ‘mechanical or routine as to require no creativity whatsoever.’”¹⁵⁹ This is because humans “chose and formulated the specific questions asked.”¹⁶⁰ Furthermore, those questions “materially contributed to the structure,” arrangement, organization, and order of *The Urantia Book*.¹⁶¹ Even

149. *Id.* at 956.

150. *Id.* at 959.

151. *Id.* at 957.

152. *See id.*; *see also* William Sadler, *A History of the Urantia Movement*, URANTIA FOUND., <https://www.urantia.org/urantia-foundation/history> (last visited Feb. 29, 2024).

153. *See Urantia Found.*, 114 F.3d at 957.

154. *Id.*

155. *Id.*

156. *Id.* at 957–58.

157. *Id.* at 958.

158. *Id.*

159. *Id.* at 959 (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991)).

160. *Id.*

161. *Id.*

though *The Urantia Book* was claimed to be authored by divine beings, the work was “at least partially the product of human creativity” and thus eligible for copyright protection.¹⁶²

C. Penguin Books U.S.A., Inc. v New Christian Church of Full Endeavor, Ltd.

*Penguin Books U.S.A., Inc. (Penguin Books)*¹⁶³ is another psychography case. This copyright infringement suit focused on a “New Age spiritual text” titled *A Course in Miracles*.¹⁶⁴ The text originated with Dr. Helen Schucman, a professor of medical psychology who became aware of shared anger and aggressive attitudes among her staff cohort at her university workplace.¹⁶⁵ While seeking a less stressful way to navigate life, she “began to hear a ‘Voice.’”¹⁶⁶ After being told to take notes by “the Voice,” she “began to write down what the Voice said.”¹⁶⁷ Dr. Schucman later described the process “as a kind of soundless ‘rapid inner dictation.’”¹⁶⁸ Eventually, “she identified the Voice as ‘Jesus.’”¹⁶⁹ After confiding in a colleague, Dr. Schucman began revising the words dictated by the Voice that she had written down.¹⁷⁰ These revisions included omitting references to Dr. Schucman’s personal life, adding punctuation, creating headings for chapters and sections, and otherwise arranging *A Course in Miracles*.¹⁷¹

After completing the transcription and revisions of *A Course in Miracles*, Dr. Schucman was told by the Voice that she should seek copyright registration for *A Course in Miracles*.¹⁷² In 1975 and 1976, two copyright registrations, listing the author as “Anonymous,” were granted for *A Course in Miracles*.¹⁷³ Almost twenty years later, the defendant, New Christian Church of Full Endeavor, began copying and distributing *A Course in Miracles* free of charge.¹⁷⁴

162. *Id.*

163. *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, No. 96 Civ. 4126 (RWS), 2000 U.S. Dist. LEXIS 10394 (S.D.N.Y. July 25, 2000).

164. *Id.* at *4.

165. *Id.* at *5.

166. *Id.*

167. *Id.* at *6.

168. *Id.*

169. *Id.*

170. *Id.* at *7.

171. *Id.* at *32–33.

172. *Id.* at *13.

173. *Id.* at *17. As an aside, anonymous registrations are allowable under copyright law, but are only protected for ninety-five years from first publication or 120 years from creation, whichever comes first. See 17 U.S.C. § 302(c).

174. *Penguin Books*, 2000 U.S. Dist. LEXIS 10394, at *22.

They also translated *A Course of Miracles* into other languages.¹⁷⁵ The copying, distribution, and translation all occurred without permission from the copyright owner.¹⁷⁶ Similar to other psychography cases, the defendants argued that *A Course in Miracles* “is not an original work” of the author because it was written by a non-human entity: divine beings.¹⁷⁷

In analyzing the defendant’s claim, the District Court for the Southern District of New York applied the *Feist* standard for copyright protection eligibility that requires the work to be “independently created by the author” and possess “at least some minimal degree of creativity.”¹⁷⁸ Comparing this case to *Urantia*, the court reasoned that “even if the Course came from Jesus, significant aspects of it are the direct result of it having come through Schucman.”¹⁷⁹ These “significant aspects” included the “editorial changes” and that “the initial creative spark for these changes came from Schucman and the others, not from Jesus.”¹⁸⁰ And even though “the non-human author had the final say,” *A Course in Miracles* was still eligible for copyright protection because “the humans had at least some input into, and effect on, the form and content.”¹⁸¹ Additionally, even though the source of *A Course in Miracles* was indisputably the Voice, “for purposes of federal copyright law Jesus is not the author of the Course.”¹⁸² The holding in *Penguin Books* thus demonstrates that even when non-human entities provide the substance of a work, the entire work can be protected by copyright when humans provide the creative spark.¹⁸³

V. PROPOSED STANDARD AND APPLICATION

Burrow-Giles, *Urantia*, and *Penguin Books* all illustrate that when there is sufficient human creativity involved, a work should be entitled to copyright protection, even if humans are not necessarily responsible for the bulk of the work.¹⁸⁴ Applied to *Zarya of the Dawn*, this case law establishes that the U.S. Copyright Office should not have revoked the copyright granted to artist Kris Kashtanova.

175. *Id.*

176. *Id.*

177. *Id.* at *28.

178. *Id.* at *29 (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991)).

179. *Id.* at *32.

180. *Id.* at *33.

181. *Id.* at *34.

182. *Id.* at *44.

183. *See id.* at *33–34.

184. *See supra* Part IV.

A. *Standard and Application to Zarya of the Dawn*

Any work created by humans using generative AI that involves more than merely entering a text prompt should arguably be eligible for copyright protection. Specifically, this means that if a human artist visualizes the concept and refines the prompt entered into the generative AI until the output matches the human artist's mental conception of the image, that image should be protected by copyright. This standard is consistent with the requirement for copyright protection that a work be original and creative.¹⁸⁵ Additionally, as held by the *Penguin Books* court, creations "from a non-human source should not be a bar to copyright."¹⁸⁶

The U.S. Copyright Office rejected copyright protections for *Zarya of the Dawn* because the images generated by generative AI are unpredictable, purportedly meaning the human author lacked significant control over the output.¹⁸⁷ However, as discussed next, this reasoning is incompatible with *Burrow-Giles*, *Urantia*, *Penguin Books*, and *Feist*.

1. Application of *Burrow-Giles*

First, *Burrow-Giles* recognizes that just because there is a new technology that performs the labor of creating the output does not mean the human lacks control over the output. In fact, *Burrow-Giles* illustrates that new technology, whether it be cameras or generative AI, can allow humans to exercise creative control over the output while letting a machine perform the bulk of the work.¹⁸⁸ Applied here, generative AI is that new technology. Just because generative AI is something that was not anticipated by those who came before it does not mean it should not be eligible for copyright protection. Even the current U.S. Copyright Act recognizes that new technologies may arise that will still be eligible for copyright protection.¹⁸⁹ It is not the technology, or lack thereof, that determines copyright eligibility; it is the creative spark provided by the human that puts

185. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

186. *Penguin Books*, 2000 U.S. Dist. LEXIS 10394, at *36.

187. *Zarya Letter*, *supra* note 67, at 9.

188. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59–60 (1884) (rejecting the argument that the process of taking a picture is "mere[ly] mechanical" when a camera is used because the resulting photographs were the result of the photographer's mental conception).

189. *Thaler v. Perlmutter*, No. CV 22-1564 (BAH), 2023 U.S. Dist. LEXIS 145823, at *9–10 (D.D.C. Aug. 18, 2023) (stating that "malleability is explicitly baked into the modern incarnation of the Copyright Act, which provides that copyright attaches to 'original works of authorship fixed in any tangible medium of expression, now known or later developed'" (quoting 17 U.S.C. § 102(a)) (emphasis added)).

works “within the bounds of copyright.”¹⁹⁰ While the malleability of copyright law does not “protect works generated by new forms of technology operating absent any guiding human hand,” works such as *Zarya of the Dawn* are guided and controlled by humans that visualize the image and craft a suitable prompt.¹⁹¹

Additionally, an artist who uses generative AI is still “he to whom [the generated image] owes its origin” because the artist provides the creative spark and vision necessary to generate the image.¹⁹² Even the U.S. Copyright Office recognizes that an author is “he to whom anything owes its origin.”¹⁹³ Additionally, *Zarya of the Dawn* and other similar works do not involve AI systems that generate images without human direction, like the AI in *Thaler v. Perlmutter*.¹⁹⁴ Instead, these works are directed by human artists who visualize an image in their mind and then describe that image to the generative AI until it outputs an image that matches the visualization.¹⁹⁵ Such an artist is thus an author because the artist is the “originator with the [creative] capacity” necessary for copyright protection.¹⁹⁶ Without the artist envisioning the work and then describing the work, the AI never would have generated that image on its own.¹⁹⁷ As such, the human who visualizes the work and refines a text prompt is by all accounts the author of the AI-generated work.

In *Burrow-Giles*, although the author did not create Oscar Wilde (the subject of the photograph), the author did envision and choose how Wilde would be posed.¹⁹⁸ Use of a camera to create an image thus was not “a ‘merely mechanical’ process ‘with no place for novelty, invention or originality.’”¹⁹⁹ As such, the photographs were “representatives of original intellectual conceptions of the author.”²⁰⁰ Interestingly, the emphasis in *Burrow-Giles* on the placement of Wilde by the photographer created a “‘dichotomy between creative and mechanical labor’ in which automation is in opposition to creative

190. *Id.* at *11.

191. *See id.*; Zarya Letter, *supra* note 67, at 20–21 (describing Kashtanova’s process for creating each image).

192. *See Burrow-Giles*, 111 U.S. at 58.

193. Zarya Letter, *supra* note 67, at 3 (quoting *Burrow-Giles*, 111 U.S. at 58).

194. *Compare* Zarya Letter, *supra* note 67, at 17, with *Thaler*, 2023 U.S. Dist. LEXIS 145823, at *2–3 (concerning “A Recent Entrance to Paradise,” a work claimed to have been generated solely by AI).

195. *See supra* Section V.A.

196. *See Thaler*, 2023 U.S. Dist. LEXIS 145823, at *12.

197. *See* Hughes, *supra* note 3 (noting how “[e]xamples of generative AI models” respond to prompts from humans).

198. *Burrow-Giles*, 111 U.S. at 60.

199. *Id.* at 59–60.

200. *Id.* at 58–60.

authorship.”²⁰¹ This dichotomy can be seen in play today in cases like *Zarya* where the Copyright Office sees the use of a semi-autonomous tool like Midjourney as a reason why the work is not eligible for copyright protection.²⁰²

Like the photographs of Wilde, images generated by AI are likewise representative “of original intellectual conceptions of the author” when the final images match the output visualized by the author.²⁰³ As a photographer decides various details such as lighting, the angle of the shot, what to include in the frame, the zoom, or even the time of day to take a picture, the photographer is determining whether or not taking a photo in that moment will match what they have visualized.²⁰⁴ Likewise, an artist using generative AI must consider all of the different details to include in a text prompt to the generative AI software to ensure that the output matches what the artist has visualized.²⁰⁵ The claim that an image generated by generative AI is completely random when it matches the visualization of the artist entering the prompt is thus inconsistent with what the *Burrow-Giles* court says about embodying mental conceptions: it takes creative effort to make sure everything is just right.²⁰⁶

The process for taking a photograph as described in *Burrow-Giles* and creating an image using generative AI under this standard is also similar. As one scholar noted, the photographer “uses the camera to implement a creative idea.”²⁰⁷ The Copyright Office claims that using generative AI is random, and thus is not implementing a creative idea, because it pulls an image out of “a field of visual ‘noise,’ which is refined” through the text prompts entered by a human.²⁰⁸ What the Copyright Office fails to consider is that this is a similar process to taking a picture. Equipped with a camera in hand, photographers encounter an entire world of *noise* from which to sift through. Of an almost infinite sea of potential subjects, photographers must choose what is worthy of being photographed. Like an artist generating images with generative AI, the photographer sometimes is only equipped with a *text prompt*—something the artist wants to capture, such as a sunflower, a beach view, or a family portrait. Additionally, like an artist using generative AI, a photographer visualizes the

201. Jung, *supra* note 18, at 1159.

202. See Zarya Letter, *supra* note 67, at 8.

203. See *Burrow-Giles*, 111 U.S. at 58–60.

204. See *id.* at 60 (discussing how a photographer’s “mental conception” is given form by posing the subject, “selecting and arranging the costume, draperies, and other various accessories,” making decisions concerning lighting, and directing the subject’s expression).

205. See *id.*

206. See *id.*

207. Jung, *supra* note 18, at 1158–59.

208. Zarya Letter, *supra* note 67, at 9.

desired output and then uses a tool, in this case the camera, to generate the desired output.

If anything, there is more creative input required to generate an image with generative AI than to take a picture.²⁰⁹ A photographer, for example, could stumble upon some new or noteworthy subject. But under this Note's proposed standard for works generated by AI, an individual must have envisioned the image that is to be generated. Stumbling upon an image created by generative AI is insufficient to be protected by copyright because it lacks the creative element required by *Feist*.²¹⁰ Thus, because Kashtanova's creative process led to outputs that reflected the "original intellectual conceptions of the author,"²¹¹ generative AI functions similarly to photography, and using generative AI requires more creativity than taking a picture, the Copyright Office should not have stripped *Zarya of the Dawn*'s images of copyright protection.

Not only is using generative AI similar to photography, but using generative AI also has close similarities to seeking divine revelation. As the next Section explains, *Urantia* and *Penguin Books* stand for the proposition that non-human generation of content is not a bar to copyright protection.²¹²

2. Application of *Urantia* and *Penguin Books*

Second, *Urantia* and *Penguin Books* demonstrate that even when human authors lack control over the substance of a work, the work is still eligible for copyright protection.²¹³ In both *Urantia*²¹⁴ and *Penguin Books*²¹⁵, the human authors lacked any level of significant control over the substance of the output. In *Urantia*, the extent of human involvement in authoring *The Urantia Book* constituted deciding which questions to ask the divine beings granting revelation.²¹⁶ In *Penguin Books*, where the book *A Course in Miracles* was claimed to have been dictated by the voice of Jesus, the only significant control that humans had over the book was over editorial changes.²¹⁷

209. *Id.* at 20–21.

210. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

211. *Burrow-Giles*, 111 U.S. at 58.

212. *See, e.g.*, *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, No. 96 Civ. 4126 (RWS), 2000 U.S. Dist. LEXIS 10394, at *36 (S.D.N.Y. July 25, 2000).

213. *See discussion supra* Sections IV.B., IV.C.

214. *Urantia Found. v. Maaherra*, 114 F.3d 955, 956 (9th Cir. 1997) (recognizing that the work was "authored by celestial beings and transcribed, compiled, and collected by mere mortals").

215. *Penguin Books*, 2000 U.S. Dist. LEXIS 10394, at *34 (noting that "the non-human author had the final say").

216. *Urantia*, 114 F.3d at 959.

217. *Penguin Books*, 2000 U.S. Dist. LEXIS 10394, at *32–33.

Here, there is a similarity between *Urantia*, *Penguin Books*, and using generative AI to generate creative works. For instance, a human asks a non-human entity for something—an answer from a divine being or an image from generative AI—and the non-human entity responds.²¹⁸ In *Penguin Books*, the copyright owner did not ask for anything from “the Voice” and the book in question was still copyrightable.²¹⁹ Like the divine beings in *Urantia* and *Penguin Books*, we may not completely understand the revelatory process, i.e., how generative AI works, but that does not matter because the creative spark originates with a human author.²²⁰

Furthermore, visualizing an image and then crafting text inputs to generate that image requires much more creativity than what was previously required when dealing with non-human creations. In fact, *Urantia* did not require human creativity for the *substance* of what was contained in *The Urantia Book*.²²¹ To the contrary, the court only noted that “the specific questions asked . . . materially contributed to the structure, arrangement, organization, and order of the *Urantia Book*.”²²² And in *Penguin Books*, the work in question, *A Course in Miracles*, only needed editorial changes and an initial creative spark to be eligible for copyright protection.²²³ Visualizing an image and refining a text prompt until the output matches the visualization requires significantly more creativity than editorial changes or the arrangement of a book because visualization requires that one begins with the end in mind.²²⁴ If making some minor editorial changes to or organizing the words of a divine non-human entity are sufficient to be eligible for copyright protection, then an iterative process of visualization, refinement, and selection is eligible for protection.²²⁵ In the case of *Zarya*, it took the artist Kashtanova “over a year from conception to creation” to figure out the right prompts that would lead to the desired image outputs.²²⁶ Generating an image using AI requires more human involvement than passively receiving the words of a divine being because the human artist must visualize the output that

218. *See Urantia*, 114 F.3d at 957.

219. *Penguin Books*, 2000 U.S. Dist. LEXIS 10394, at *5–7.

220. *See id.* at *33 (finding that “the initial creative spark for these changes came from Schucman and the others, not from Jesus”).

221. *Urantia*, 114 F.3d at 959 (discussing how it was the human selection and arrangement that met the creativity requirement established by *Feist*).

222. *Id.*

223. *Penguin Books*, 2000 U.S. Dist. LEXIS 10394, at *33.

224. *See id.* at *32–33 (explaining that the human authors did not know what the material was going to be because the revelations would have been different if anyone else received them).

225. *See id.* at *33–34; *Urantia*, 114 F.3d at 959.

226. *Zarya Letter*, *supra* note 67, at 9.

is desired.²²⁷ This is especially true given that, even though the “non-human author had the final say,” both *The Urantia Book* and *A Course in Miracles* were still protected by copyright.²²⁸

Perhaps recognizing the significance of *Urantia* and *Penguin Books*, the U.S. Copyright Office notes that works authored by non-humans can “gain copyright protection if there is ‘human selection and arrangement of the revelations.’”²²⁹ However, the Copyright Office’s guidance was seemingly ignored in *Zarya*. This is because *Zarya of the Dawn* included “human selection and arrangement” of the pictures used in the comic book.²³⁰ Kashtanova selected and arranged the pictures in *Zarya of the Dawn* when she spent more than a year trying to match the visualization in her head to what was being output by generative AI.²³¹ She also edited two of the pictures to better match her mental conception.²³² There is a disconnect when the Copyright Office grants copyright protection to works when the creative spark and direction comes from spirits, and not when the creative spark comes from the human while a non-human performs the labor.²³³ Thus, applying *Urantia* and *Penguin Books*, Kashtanova’s images in *Zarya of the Dawn* should be protected by copyright law.

With that being said, the Copyright Office’s decision to revoke copyright protection for *Zarya of the Dawn* here may also stem from the uncertainty concerning who would own the copyright if AI-generated works are eligible for copyright protection.²³⁴ One scholar argued that generative AI should be listed as the author in fact, while the programmer is listed as the author in law.²³⁵ Under the scholar’s proposed scheme, there would be a fifty-year (or less if Congress so desires) term limit on copyright protection.²³⁶ With the programmer who

227. See *Urantia*, 114 F.3d at 957; *Penguin Books*, 2000 U.S. Dist. LEXIS 10394, at *6.

228. See *Penguin Books*, 2000 U.S. Dist. LEXIS 10394, at *34.

229. *Zarya* Letter, *supra* note 67, at 4.

230. See *id.* at 8, 20–21.

231. See *id.* at 9.

232. *Id.* at 10–11.

233. See *Urantia Found. v. Maaherra*, 114 F.3d 955, 959 (9th Cir. 1997) (holding that asking questions to divine beings was sufficient to qualify for copyright protection); *Penguin Books*, 2000 U.S. Dist. LEXIS 10394, at *33–34 (holding that editorial changes for a work claimed to have come from Jesus were sufficient to qualify for copyright protection).

234. The U.S. Copyright Office analogizes using generative AI to hiring an artist and giving that artist general directions as to the expected result. *Zarya* Letter, *supra* note 67, at 10. In this situation, the artist owns the copyright, unless the work is a work made for hire. *Id.* Taking this analogy one step further, this could mean that the developers of generative AI software might own the copyright of images generated by their AI software. See *id.*

235. Jung, *supra* note 18, at 1176.

236. *Id.*

developed the generative AI as the author in law, the programmer would reap all of the benefits of copyright protection and all of the risks from “liability if their program is faulty.”²³⁷ In particular, this model is meant to “incentivize[] creators of generative AI who would be unable to monetize their software without monetizing the output.”²³⁸

This scholar’s proposed model fails to recognize that the purpose of copyright law is to protect creativity, not to incentivize programmers.²³⁹ While programmers may be able to obtain copyright protection in the code for generative AI,²⁴⁰ the programmers of generative AI have provided no creative input to the works generated by generative AI because they are not the ones visualizing the output and inputting text prompts.²⁴¹

In contrast to the scholar’s model, human authors should be listed as authors on the copyright registration. Because the creative spark comes from the human using generative AI as a tool, and that creative spark is what copyright law exists to protect, the human artist should be listed as the author on any copyright registration.²⁴² All in all, because generative AI is a tool like a camera, authorship of the work should remain with the human that provided the creative vision as the author.²⁴³ Additionally, when the human creator is listed as the author, it “advance[s] the primary purpose of copyright law in promoting the progress of science” by incentivizing end users to “operate the program and generate new works.”²⁴⁴

Given the similarities in the copyright context between generative AI, photography, and divine revelation, the remaining hurdle to copyright protection is to ensure that the work is creative enough to be protectable.

237. *Id.*

238. *Id.*

239. *See In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

240. *Other Digital Content*, U.S. COPYRIGHT OFF. (Oct. 25, 2023), <https://www.copyright.gov/registration/other-digital-content/> (“Works Commonly Registered” includes “Computer Programs”).

241. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59–60 (1884) (discussing mental conception that allowed a photograph to be eligible for copyright protection).

242. *See Trade-Mark Cases*, 100 U.S. at 94; *see also Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. CONST. Art. I, § 8, cl. 8).

243. *See Burrow-Giles*, 111 U.S. at 60 (explaining how the photographer used a camera to capture his own “intellectual invention”); *see also* discussion *supra* Part V; Section I.A.1.

244. Brown, *supra* note 72, at 38.

3. Application of *Feist*

Third, *Feist* only requires a modicum of human creativity for a work to be original enough to be eligible for copyright protection.²⁴⁵ If it is possible for names and numbers in a phone book to be organized in a creative enough way to garner copyright protection, then visualizing an image and crafting text prompts that allow generative AI to output a matching image exceeds such a minimum level of required creativity.²⁴⁶ Taking almost a year to craft a prompt that generates an image matching an artist's conception requires much more creativity than deciding whether to organize a phone book alphabetically, geographically, or by some other means.²⁴⁷ Furthermore, visualizing an image and refining a text prompt requires more creativity than taking a picture or receiving revelation from a divine being, both of which met the low bar of *Feist*.²⁴⁸ As such, *Zarya of the Dawn* met the creativity standard required by *Feist* and should be protected by copyright.

In denying copyright protections to *Zarya of the Dawn*, the U.S. Copyright Office also appears to consider the AI-generated images as analogous to noncreative facts that are ineligible for copyright protection under *Feist* because the Copyright Office assumes that *Zarya of the Dawn* did not have human direction.²⁴⁹ This is demonstrated by the Copyright Office granting protection to the text, as well as the arrangement and selection of images, but not the images themselves.²⁵⁰ This distinction is improper because generative AI does not simply recall past training materials and generative AI requires human input to create an image.²⁵¹ The images generated by generative AI are not unchangeable facts, but variable outputs that respond to human direction.²⁵² Furthermore, even if the images themselves are unprotectable, *Zarya of the Dawn* is a compilation of images that would still be eligible for protection under *Feist* because the artist Kashtanova chose the order and arrangement of the images.²⁵³

245. *Feist*, 499 U.S. at 346.

246. *See id.* at 362–64.

247. *See* Zarya Letter, *supra* note 67, at 9.

248. *See* discussion *supra* Sections V.A.1., V.A.2.

249. *See* Zarya Letter, *supra* note 67, at 9; *Feist*, 499 U.S. at 349–51 (noting how facts are ineligible for copyright protection because they are discovered, but compilations of facts are protectable if they have sufficient creativity).

250. Zarya Letter, *supra* note 67, at 12.

251. *See supra* Section I.A.

252. *See infra* Section II.B.

253. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991); Zarya Letter, *supra* note 67, at 20.

4. Response to Other Criticisms

Contrary to the assertion by the U.S. Copyright Office that generative AI is “unpredictable,”²⁵⁴ it is not random.²⁵⁵ As discussed earlier, generative AI attempts to predict the expected outcome.²⁵⁶ As noted by Kashtanova, because the text prompts must be so precise, this is a process that requires significant trial and error to come to a point where the image matches the author’s visualization of the image.²⁵⁷ This process does not take so long because generative AI is random, but because this is a new technology that requires specific language to generate a specific output.²⁵⁸

As the Congressional Research Service notes, some commentators argue that AI-generated images should be ineligible for copyright protection because humans contribute “nothing more than an idea” to the image.²⁵⁹ This argument is targeted towards those images where the author does nothing more than “enter[] a text prompt into an AI program.”²⁶⁰ However, this argument oversimplifies the process artists engage in when using generative AI to create an image. For example, the first step that the previously mentioned LinkedIn artist took was to “visualize an image.”²⁶¹ Artist Kashtanova engaged in an iterative process, refining the text prompts until the final image matched the one that she had envisioned in her head.²⁶² If one does not visualize the final image, one cannot recognize when the generated image is what was sought after. In this sense, an artist that does not visualize the image to be generated is discovering something that is ineligible for protection.²⁶³

However, there may be individuals who solely contribute an idea to the generative AI. Those ideas should not be eligible for copyright protection because they lack the modicum of creativity required for copyright protection.²⁶⁴ If one does not visualize the desired work and refine the prompt or otherwise edit the image to match that original visualization, there is a much stronger argument against copyright protections. For example, if an artist tells a generative AI model to create an image of “hedgehogs on a beach having a tea party,” the artist

254. Zarya Letter, *supra* note 67, at 9.

255. Lindberg, *supra* note 25 at 22.

256. See discussion *supra* Section I.A.

257. Zarya Letter, *supra* note 67, at 9, 25.

258. *Id.* at 25.

259. ZIRPOLI, *supra* note 15, at 2.

260. *Id.*

261. Perez, *supra* note 42; see also discussion *supra* Section I.B.

262. Zarya Letter, *supra* note 67, at 8.

263. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991).

264. See *id.* at 346.

may have only contributed an idea.²⁶⁵ This is because there are far too many questions that have been unanswered when a human fails to visualize the desired image and refine the text prompts accordingly. How many hedgehogs are there? What color(s) are they? What time of day is it? What art style forms the basis of the image? Thus, when a human fails to visualize the image in their mind and reform the prompt until the output matches the desired visualization, the human artist fails to exercise creative control.²⁶⁶

The argument that artists only contribute an idea to generative AI also focuses on protecting the labor that is often involved in traditional art.²⁶⁷ But labor is not what copyright law protects.²⁶⁸ Just because a computer is doing some of the work does not mean that the work is ineligible for copyright protection. While this Note accepts the Copyright Office's proposition that the amount of time spent on a project does not determine eligibility for copyright protection, it is likewise axiomatic that how little or how much time and labor one spends creating a work does not determine whether a work is eligible for copyright protection.²⁶⁹

Based on the case law discussed in this Section, the Copyright Office has made an understandable policy decision to not grant copyright protections for works generated using AI. However, to bring the policy of the Copyright Office further in line with the general policy of copyright law and current case law, AI-generated works that result from an author visualizing the image and refining a text prompt to lead to that output should be protected by copyright. Beyond being consistent with copyright law, such an approach allows far more individuals to be creative by introducing using a new tool to create art that can be protected. Legislative proposals, such as the Federal Anti-Impersonation Rights Act, also balance the rights of existing artists with incentivizing creativity in new artists by preventing copying an artist's style for economic gain.²⁷⁰ All in all, the advantages of the proposed standard arguably outweigh any disadvantages. Society benefits by granting copyright protection to works created by humans using generative AI who have visualized the image and refined the prompt to reach a particular output because it unleashes the human potential for creativity.²⁷¹

265. ZIRPOLI, *supra* note 15, at 2.

266. Zarya Letter, *supra* note 67, at 9.

267. *See* Shaffi, *supra* note 54.

268. *See Feist*, 499 U.S. at 341 (explaining that the purpose of copyright is to advance science and arts).

269. COMPENDIUM, *supra* note 60, at § 310.7.

270. *See infra* Section V.C.

271. The use of generative AI “introduce[s] new ideas and aesthetics” to art and provides insight into why humans create art the way humans do. Jung, *supra* note 18, at 1168.

B. *Advantages*

The biggest advantage to protecting images created by generative AI when the human artist visualizes the output is that it incentivizes individuals who ordinarily would not be able to create works of art to do so.²⁷² This opens the world of creative works up to those who have the intellectual power to imagine something, but lack the artistic talent to translate creativity into art. Protecting images created by humans using generative AI is thus consistent with the general policy of copyright law.²⁷³ The founders of the U.S. Constitution noted the importance of promoting the “Progress of Science and useful Arts” and therefore established copyright protection as part of the founding of this country.²⁷⁴ Allowing copyright protection for works generated by AI promotes the progress of “useful Arts” by allowing more individuals to reach their creative potential.²⁷⁵

Generative AI bridges the divide between individuals who can visualize an image in their mind but lack the skill or ability to put pen to paper and draw it.²⁷⁶ The use of generative AI thus allows individuals to be more creative than they could without the use of generative AI. Just as cameras allow individuals who cannot draw or paint to successfully capture the world around them, generative AI allows those who cannot draw or paint to imagine new mental conceptions and create them. Generative AI thus should be viewed as a tool to expand the human mind and bring human imagination to life.

Collaboration between humans and generative AI can benefit almost any creative endeavor. In fact, generative AI has been used to assist artists in writing songs, choreographing dance, creating sculptures, and even filling a museum. *See Ornes, supra* note 2. Generative AI allows communities who lack traditional artistic skills to engage with art—something that ordinarily would not be possible. *Id.*

272. Generative AI incentivizes creation by reducing the barriers to entry for those who lack traditional artistic skills to get involved in art. For example, most of the users of the music-generating AI ALYSIA are first-time songwriters with no prior experience. *See Ornes, supra* note 2.

273. *See Feist* 499 U.S. at 350 (quoting *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879)).

274. U.S. CONST. art. I, § 8, cl. 8.

275. *See Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903) (dismissing swiftly the argument that “painting and engraving unless done for a mechanical end are not among the useful arts” because “useful” is not limited to “that which satisfies immediate bodily needs” (citing *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53 (1884))).

276. *See Shaffi, supra* note 54.

C. Disadvantages

Perhaps the greatest disadvantage to providing copyright protection comes from training generative AI models. As an example, several generative AI model developers have been sued by artists claiming copyright infringement for using copyrighted works to train the AI models.²⁷⁷ This is an issue that could easily form the basis of another article. Nevertheless, some generative AI models, such as Adobe Firefly, are attempting to get ahead of the curve by only training on licensed images, the public domain, and other generative AI outputs already in the public domain.²⁷⁸ Others, such as DALL-E 3,²⁷⁹ allow artists to opt out from having their works used to train generative AI.²⁸⁰ Because generative AI developers want to continue improving their software, such forward-thinking steps to reduce the risk of copyright infringement during the training process are arguably the way forward.

Additionally, granting copyright protection to images generated by humans using generative AI may take benefits, such as potential profits earned by posting content behind a paywall, away from those individuals or entities that develop generative AI.²⁸¹ This may de-incentivize development of generative AI if new parties can come in and reap the benefits of copyright protections. However, this potential loss is balanced out by the increase in demand for generative AI that would accompany end users knowing that they own the copyright in the output.²⁸² In fact, granting copyright ownership to the non-developer human author provides more profit for developers. This is because images generated by AI are currently in the public domain so developers could not sue individuals who copied content from behind a paywall and posted it for free.²⁸³ As a result,

277. Nicole Clark, *Artists Sue AI Art Generators Over Copyright Infringement*, POLYGON (Jan. 17, 2023, 2:56 PM), <https://www.polygon.com/23558946/ai-art-lawsuit-stability-stable-diffusion-deviantart-midjourney>.

278. Dana Rao, *The FAIR Act: A New Right to Protect Artists in the Age of AI*, ADOBE (Sep. 12, 2023), <https://blog.adobe.com/en/publish/2023/09/12/fair-act-to-protect-artists-in-age-of-ai>.

279. *DALL-E2*, *supra* note 41.

280. However, opting out can be “an onerous process.” See Matteo Wong, *Artists are Losing the War Against AI*, ATLANTIC (Oct. 2, 2023), <https://www.theatlantic.com/technology/archive/2023/10/openai-dall-e-3-artists-work/675519/> (regarding artists’ requests to exclude their images from AI training models).

281. The main benefit lost by developers would be profit. Under the current regime where AI-generated content is in the public domain, the developer of generative AI systems can be considered a publisher that could make money by locking AI-generated content behind a paywall. See Jung, *supra* note 18, at 1171–72.

282. Brown, *supra* note 72, at 37.

283. Jung, *supra* note 18, at 1172.

less people would be willing to pay for AI-generated content since it would be available for free elsewhere.²⁸⁴ Thus, granting copyright balances the interests of AI developers, incentivizing the further development of generative AI models, while recognizing the creative contribution of the human. Additionally, AI developers should not receive the benefits of copyright protection because they do not provide the creative spark that forms the basis of any work created by a human artist who uses generative AI.²⁸⁵

As it currently stands, developers of generative AI are not likely to impose great costs on human artists using generative AI because the developers receive the benefit of feedback that improves the AI model.²⁸⁶ This feedback helps developers create better models that provide further value to developers, and end users. Additionally, developers of generative AI receive another benefit from generative AI users gaining copyright protections for AI-generated works: the value of the software goes up.²⁸⁷ This is because users expect to be able to control what is done with the output of the software they use.²⁸⁸

Another potential issue with granting copyright protection to works created by humans who have visualized the desired image and created the work using generative AI is proving that the author visualized the image. Because there are so many things that the U.S. Copyright Office takes at face value during an application, this is not a serious issue.²⁸⁹ If the Copyright Office was concerned about individuals lying, then a solution would be to amend the copyright application form to include a field where an artist can describe their visualization process. As shown by *Zarya*, the Copyright Office is certainly also able to seek further information from the author of the work.²⁹⁰

Another common criticism of granting copyright protection to humans creating works using generative AI is that the protection of AI-generated images would devalue the work done by traditional artists.²⁹¹ The fear here is that someone can do in ten minutes what may take a traditional artist hours or months

284. *Id.*

285. *See In re Trade-Mark Cases*, 100 U.S. 82, 94. (1879).

286. *See Lindberg, supra* note 25, at 15–16 (discussing how generative AI models are improved by increasing the number of inputs that the model is exposed to).

287. Brown, *supra* note 72, at 37.

288. *Id.*

289. *Form for Registration of Visual Arts*, U.S. COPYRIGHT OFF. <https://www.copyright.gov/forms/formva.pdf>; *see also Zarya Letter, supra* note 67, at 14 (stating that without the reporter, the U.S. Copyright Office never would have known Kashtanova used AI to create *Zarya*).

290. *Zarya Letter, supra* note 67, at 14.

291. *See, e.g., Shaffi, supra* note 54 (explaining that many artists have “concerns about the legality of AI image generators, and about how they have the potential to devalue the skill of illustration”).

to accomplish, “even if in reality your skills don’t go beyond drawing a stick figure.”²⁹² However, this critique entirely overlooks that copyright law is not meant to protect someone’s labor, but to protect human creativity.²⁹³ Undoubtedly, it takes significantly more work to create something by traditional means. There is more labor involved. But merely less involved labor should not mean that AI-generated images are ineligible for copyright protection. One could have made the same argument against photography; it takes far less work to take a picture than to draw a picture. Furthermore, not every artist feels that generative AI is a threat to their livelihood. Rather, some artists believe that generative AI can “enhance the work of artists” and “enable the creation of entirely new forms of art and expression.”²⁹⁴ Moreover, not every artist is capable of laboring to create “traditional” art. After one artist suffered a stroke and could no longer draw, generative AI enabled him to continue creating art.²⁹⁵ Generative AI thus provides accessibility to art for artists who are disabled or otherwise cannot create traditional art.

A possible solution that would balance potential harm to artists with copyright protection for creative works is the proposed Federal Anti-Impersonation Right Act (FAIR Act).²⁹⁶ The FAIR Act would create “a right of action” for artists who are affected by those who engage in “intentional impersonation using AI tools for commercial gain.”²⁹⁷ This includes the impersonation of one’s likeness.²⁹⁸ The key element of a violation of the FAIR Act would be intent.²⁹⁹ Adobe notes the difference between studying an artist’s style and adding one’s own twist to it compared to simply typing “an artist’s name into a prompt.”³⁰⁰ This approach arguably negates the potential harm to artists and should alleviate any concerns that an individual could easily put any artist out of business because it prevents individuals from copying an artist’s specific style. And even without legislation, generative AI models, such as DALL-E 3, are taking the lead by “declin[ing] requests that ask for an image in the style of a living artist.”³⁰¹

292. *Id.*

293. *See* discussion *supra* Section II.B.

294. Shaffi, *supra* note 54.

295. *See* Dale J. Rappaneau, *Art-Generating AI as an Accessibility Tool for Disabled Artists*, SUBSTACK (Jan. 25, 2023), <https://techtualist.substack.com/p/art-generating-ai-as-an-accessibility>.

296. *See* Rao, *supra* note 278.

297. *Id.*

298. *Id.*

299. *See id.*

300. *Id.*

301. Wong, *supra* note 280.

On balance, the advantages of granting copyright protection to works created by humans using generative AI thus outweigh the potential disadvantages. And given the low level of creativity required, and the prior examples of works generated by non-humans that were still eligible for copyright protection, AI-generated images should be protected by copyright law when the human author visualizes the image and uses AI to create an image that matches that visualization. This approach best implements the policy of copyright law to promote creativity by protecting “the fruits of intellectual labor” that are “founded in the creative powers of the mind.”³⁰² As a result of such an approach, more communities will be empowered to engage in artistic endeavors than ever before.

CONCLUSION

There are many people who cannot, on their own, write a symphony or paint a beautiful picture on a canvas. As the invention of photography opened a new field for human creativity, the invention of generative AI allows many who desire to create art to delve into new creative fields. While some may critique the use of generative AI to create works as devaluing the work of so-called “real” artists, it remains clear that the purpose of copyright is not to protect labor, but to protect and promote human creativity. Granting protections to works created by humans who have used generative AI to embody the artist’s own mental conception, like *Zarya of the Dawn*, recognizes that the creative spark comes from the human artist, not the generative AI. In the case of *Zarya*, using generative AI requires more creativity than found in previous cases like *Urantia* since the artist using generative AI visualizes and controls the substance of what is being produced. As such, *Zarya of the Dawn* meets the creative requirement of *Feist* and should be protected by copyright. Such an application of copyright law best protects and promotes human creativity. Generative AI is not a tool to be feared, but a tool to be embraced as unleashing the potential of human creativity for the betterment of mankind and the “Progress of Science and Useful Arts.”³⁰³

302. *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

303. U.S. CONST. art. I, § 8, cl. 8.