

CASE ANALYSIS ON ZARYA OF THE DAWN: THE CASE THAT NEARLY CHANGED THE HISTORY OF US COPYRIGHT LAW

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INTRODUCTION

In a world where ideas like chat GPT have the power to alter the course of history, numerous issues need to be resolved swiftly. One of these issues is copyright. There are two concepts when it comes to AI-generated Art. One, using AI as a mere tool, and second, the AI its-self creating Art. Zarya of the Dawn was initially given the copyright and later the USCO revoked the registration.¹

THE FACT OF THE CASE

Ms. Kashtanova sought copyright protection for the comic “Zarya of the Dawn” with the United States Copyright Office, submitting an application for the Work along with copies of every page as the deposit copy on September 15, 2022. After reviewing the application, the office registered the work under the reference number V Au001480196² but they did not mention that the graphics were made using Midjourney, an artificial intelligence picture generator.³ The comic was granted copyright protection, but after learning the fact, the Copyright Office launched an action to withdraw the artwork's protection.⁴ In February 2023, the artwork's copyright was revoked.⁵ According to the Copyright Office, only works created

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(1) Chris Viola “Comic Book ‘Zarya Of The Dawn’ Takes Its Place In History As The U.S. Copyright Office Makes Landmark Decision To Reject The First Submitted A.I. Created Work — CultureSlate” (CultureSlate, March 1, 2023) <https://www.cultureslate.com/news/comic-book-zarya-of-the-dawn-takes-its-place-in-history-as-the-us-copyright-office-makes-landmark-decision-to-reject-the-first-submitted-ai-created-work> (Last accessed on 23 April 2023)

(2) “U.S. Copyright Public Records System” (U.S. Copyright Public Records System) <https://publicrecords.copyright.gov/detailed-record/34309499> (Last accessed on 22 April 2023)

(3) Brian Cronin, ‘AI-Created Comic Could Be Deemed Ineligible for Copyright Protection: The United States Copyright Office initiates a proceeding ruling that a comic book made using A.I. art is ineligible for copyright protection’ Dec 21, 2022 <https://www.cbr.com/ai-comic-deemed-ineligible-copyright-protection/> (Last accessed on 22 April 2023)

(4) Monit Khanna, ‘Comic Book Made By AI Loses Copyright Protection’ Updated on Dec 23, 2022, <https://www.indiatimes.com/technology/news/comic-book-made-by-ai-loses-copyright-protection-588388.html> (Last accessed on 22 April 2023)

(5) Linda Codega, “An AI-Illustrated Comic Has Lost a Key Copyright Case: Kris Kashtanova, who attempted to copyright a comic book illustrated with images from Midjourney, has legal claim to some parts of the work, February 23, 2023, <https://gizmodo.com/zarya-of-the-dawn-midjourney-comic-ai-art-copyright-1850149833> (Last accessed on 22 April 2023)

by humans are protected.⁶ Although the photos themselves are not protected by copyright, the arrangement of the images, as well as the narrative and tale of the book, are since they are the creative work of Ms. Kashtanova rather than artificial intelligence.⁷

LEGAL ISSUES

- Whether the work provided to the USCO for registration was the result of human authorship or not.
- Whether AI-generated Art is copyrightable or not.
- Whether the scope of Copyright includes non-human authors or not

LEGAL HISTORY AND STANDARDS OF AI-GENERATED ART.

Kris Kashtanova, a New York-based novelist and software developer, first gained copyright protection for the 18-page graphic novel "Zarya of the Dawn" last year on 15th September,⁸ which was inspired by her late Grandmother. Kashtanova explained at the time that she went to get the copyright so that she could "make a case that we do own copyright when we make something using AI."⁹ The USCO follows court rulings in its registration procedures, and the Compendium of U.S. Copyright Office Practises sets guidelines for analyzing and registering copyrighted works.¹⁰ The Office will refuse to register a claim if it determines that a human

⁽⁶⁾ Sam Sachs, "US Copyright Office rules AI-generated artwork, content not legally protected" 02/24/23, <https://thehill.com/policy/technology/3872614-us-copyright-office-rules-ai-generated-artwork-content-not-legally-protected/> (Last accessed on 22 April 2023)

⁽⁷⁾ Riddhi Setty, "AI-Assisted 'Zarya of the Dawn' Comic Gets Partial Copyright Win", Feb. 23, 2023, 2:58 AM, <https://news.bloomberglaw.com/ip-law/ai-assisted-zarya-of-the-dawn-comic-gets-partial-copyright-win> (Last accessed on 22 April 2023)

⁽⁸⁾ James Hookway, "AI-Generated Comic Book 'Zarya of the Dawn' Keeps Copyright but Key Images Excluded: Protection can't be granted to images created with artificial intelligence software, U.S. Copyright Office says." Feb. 24, 2023 at 1:01 pm <https://www.wsj.com/articles/ai-generated-comic-book-zarya-of-the-dawn-keeps-copyright-but-key-images-excluded-c8094509> (Last accessed on 22 April 2023)

⁽⁹⁾ Stephen Wolfson "Zarya of the Dawn: US Copyright Office Affirms Limits on Copyright of AI Outputs - Creative Commons" (Creative Commons, February 27, 2023) <https://creativecommons.org/2023/02/27/zarya-of-the-dawn-us-copyright-office-affirms-limits-on-copyright-of-ai-outputs/> (Last accessed on 22 April 2023)

⁽¹⁰⁾ Copyright Office Of The United States, Compendium Of Copyright Office Practises, (3rd Ed. 2021). ("Compendium (Third)")

being did not create the work,¹¹ such as a photograph taken by a monkey¹² or an application for a song naming the Holy Spirit as the author.¹³

The boundaries of copyright protection are outlined in the Copyright Act.¹⁴ A work may be registered under the Act if it meets the criteria of being an "*Original work of authorship fixed in any tangible medium of expression.*"¹⁵ According to the Supreme Court, the definition of "original" in this context includes two elements: autonomous creation and sufficient imagination.¹⁶ The first requirement is that the author must have independently produced the work. Second, the work must be sufficiently creative.¹⁷

Courts have consistently restricted the definition of "works of authorship" to the works produced by human writers.¹⁸ For instance, the Supreme Court determined that photographs were covered by copyright in *Burrow-Giles Lithographic Co. v. Sarony*¹⁹ because they were "*representatives of original intellectual notions of the author,*" who was defined as "*he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.*"²⁰

Alleged works by non-humans are not protected by copyright since human selection and structuring of revelations are required for them to be protected by copyright.²¹ Not long before, the United State Copyright Office ("USCO") has already refused to provide copyright protection to AI-produced art, including Stephen Thaler²² and his AI-generated artwork "A Recent Entrance to Paradise."²³ The USCO knew about the fact that Zarya of the Dawn is

(11) Copyright Office Of The United States, *Compendium Of Copyright Office Practises*, 313.2 (3rd Ed. 2021). ("Compendium (Third)")

(12) *Naruto v. Slater*, No. 16-15469 (9th Cir. 2018)

(13) "The Holy Spirit, Author of Scripture — Today Daily Devotional" (Today Daily Devotional) <https://todaydevotional.com/devotions/the-holy-spirit-author-of-scripture> (Last accessed on 23 April 2023)

(14) The Copyright Act of 1976.

(15) The Copyright Act of 1976, s 17 U.S.C. § 102(a)

(16) *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)

(17) *Ibid.*

(18) R. Anthony Reese, *Berkeley Technology Law Journal*, "Copyrightable Subject Matter in the "Next Great Copyright Act" Vol. 29, No. 3 (Spring 2015), pp. 1489-1534 (46 pages) Published By: University of California, Berkeley, School of Law

(19) *Burrow-Giles Lithographic Company v. Sarony*, 111 U.S. 53 (1884)

(20) *Ibid.*

(21) *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955, 957–59 (9th Cir. 1997).

(22) U.S. Copyright Office Review Board, *Decision Affirming Refusal of Registration of A Recent Entrance to Paradise* (Feb. 14, 2022), <https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf>. (Last accessed on 23 April 2023)

(23) "The US Copyright Office Says an AI Can't Copyright Its Art" (The US Copyright Office says an AI can't copyright its art - The Verge, February 21, 2022) <https://www.theverge.com/2022/2/21/22944335/us-copyright-office-reject-ai-generated-art-recent-entrance-to-paradise> (Last accessed on 22 April 2023)

created by AI through an art generator called Midjourney,²⁴ and revoked the Copyright protection initially granted.²⁵

JUDGEMENT

The registration certificate for Zarya of the Dawn, number VAU001480196,²⁶ was issued based on inaccurate and incomplete information declared by Robert J. Kasunic, Associate Register of Copyrights and Director of the Office of Registration Policy & Practise.²⁷ The Office will cancel the previous registration and replace it with a new registration covering the original authorship that Ms. Kashtanova contributed to the work, namely, the "text" and the "selection, coordination, and arrangement of the text created by the author and artwork generated by "Artificial intelligence."²⁸

The office further clarified that the public record will reflect a new, more limited registration, with a cross-reference to the canceled registration. The new certificate with the reason for reregistration: VAU001480196 was canceled for failure to exclude non-human authorship.²⁹

ANALYSIS OF THE JUDGEMENT

Whether Ms Kashtanova's use of Midjourney to produce the comic book's illustrations constituted an original, and creative work was the subject of the USCO review. This idea suggests that the author's final work and the process of making the innovation are two separate notions. This further raises the question like Getty image case³⁰ where the discussion of how and what the AI tool learns from, creates concerns about perhaps the learning process (as opposed to the result) violates copyright,³¹ as copyrighted work and others are also allegedly

⁽²⁴⁾ "Midjourney" (Midjourney) <https://www.midjourney.com/home/?callbackUrl=%2Fapp%2F>

⁽²⁵⁾ "Comic Book 'Zarya of the Dawn' Loses Copyright of AI-Created Images in US" (On Manorama Feb 23, 2023) <https://www.onmanorama.com/news/world/2023/02/23/comic-book-graphic-novel-zarya-ai-images0copyright-midjourney.html> (Last accessed on 22 April 2023)

⁽²⁶⁾ "U.S. Copyright Public Records System" (U.S. Copyright Public Records System) <https://publicrecords.copyright.gov/detailed-record/34309499> (Last accessed on 23 April 2023)

⁽²⁷⁾ Office USC, "Robert J. Kasunic | U.S. Copyright Office" (Robert J. Kasunic | U.S. Copyright Office) <https://www.copyright.gov/about/leadership/rob-kasunic.html> (Last accessed on 23 April 2023)

⁽²⁸⁾ United States Copyright Office, "Zarya of the Dawn (Registration # VAU001480196)" February 21, 2023, www.copyright.gov (Last accessed on 23 April 2023)

⁽²⁹⁾ U.S. Copyright Office, Library Of Congress Subchapter A - Copyright Office And Procedures Part 201 - General Provisions §37 CFR 201.7(c)(4) Cancellation Of Completed Registrations.

⁽³⁰⁾ James Vincent "Getty Images Is Suing the Creators of AI Art Tool Stable Diffusion for Scraping Its Content" (Getty Images is suing the creators of AI art tool Stable Diffusion for scraping its content - The Verge, January 17, 2023) <https://www.theverge.com/2023/1/17/23558516/ai-art-copyright-stable-diffusion-getty-images-lawsuit> (Last accessed on 24 April 2023)

⁽³¹⁾ Hetty Gleave and Eddie Powell "AI and Art: How Recent Court Cases Are Stretching Copyright Principles" (The Art Newspaper - International art news and events, March 28, 2023)

fed to the AI to learn and generate various spectrum of Art and image. Hence it further complicates the extent of Copyright. Additionally, the Copyright Office compared Kashtanova's use of Midjourney with the work of a photographer and their camera. The agency wrote that, unlike a photographer, users of Midjourney do not have the same degree of control over the final images.³² Yet, in both cases, I believe that creating or choosing the environment plays a crucial role in generating the desired result.

On 17th Sep 2022, fantasy author Ursula Vernon, who writes under the pen name T. Kingfisher, shared a comic that was partially created with the aid of Midjourney and discussed how challenging the process of refinement had been—specifically, how much work was still needed to ensure that the images this tool produced matched her artistic vision for the project.³³ The comic book "A Different Aftermath"³⁴ itself is a celebration of the healthy connections we may forge with nature even amid the destruction.³⁵

Many use AI tools like Midjourney to create visuals that they use in their work. The question is how far a person can go in claiming an AI's creative work as their own. I believe that using AI as an aid or a tool in creating a result should be copyrighted as demonstrated in the pen analogy case of *Express Newspapers v. Liverpool Daily Post*.³⁶ The USCO determining that Ms. Kashtanova was not sufficiently involved in the creation of the image by Midjourney to qualify as original work highlights how strict the office takes in the idea of Originality as the office stated the Feist test³⁷ assesses the level of originality in creative work as a bare minimum criterion.

Yet the question as to how far the idea of originality stretch, remains a discussion. Let's say, Mr. A looks up to Mr. B as a role model and imitates the style of art stroke that Mr B uses. Not

<https://www.theartnewspaper.com/2023/03/28/ai-and-art-how-recent-court-cases-are-stretching-copyright-principles> (Last accessed on 24 April 2023)

⁽³²⁾ Stephen Wolfson "Zarya of the Dawn: US Copyright Office Affirms Limits on Copyright of AI Outputs - Creative Commons" (Creative Commons, February 27, 2023) <https://creativecommons.org/2023/02/27/zarya-of-the-dawn-us-copyright-office-affirms-limits-on-copyright-of-ai-outputs/> (Last accessed on 23 April 2023)

⁽³³⁾ Clark ML and M L Clark M by, "Is AI Art Causing Future Shock, or Age-Old Economic Anxiety?" (OnlySky Media, September 13, 2022) <http://onlysky.media/mclark/is-ai-art-causing-future-shock-or-age-old-economic-anxiety/> (Last accessed on 24 April 2023)

⁽³⁴⁾ Transformative Works O for and metaphor_enjoyer, "A Different Aftermath (Webcomic) - Works | Archive of Our Own" (A Different Aftermath (Webcomic) - Works | Archive of Our Own, September 17, 2022) [https://archiveofourown.org/tags/A%20Different%20Aftermath%20\(Webcomic\)/works](https://archiveofourown.org/tags/A%20Different%20Aftermath%20(Webcomic)/works) (Last accessed on 24 April 2023)

⁽³⁵⁾ Ibid

⁽³⁶⁾ *Express Newspapers Plc v Liverpool Daily Post & Echo Plc* [1985] 3 All E.R. 680.

⁽³⁷⁾ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)

only that Mr A tries to imitate Mr B from Top to bottom in their daily life to the extent people sometimes get confused about who is who. But one cannot say that what Mr. A painted is not original, can we? Isn't the scenario similar? Feeding the data or prompting the AI to generate art that the user expects or hopes to produce and making changes to the art till the user of the AI is satisfied with the result. The only difference in the illustration is that Mr A used Mr B for inspiration to create something but just the difference is that Ms Kashtanova used AI to generate what she wanted to ease the process of creating Art. As much as Art and painting are visual, it is more of emotions and feelings too.

THE SOCIAL IMPLICATIONS

AI software is expanding at an unprecedented rate. This has both beneficial and negative consequences. The positive consequences include making it easier for humans to create creative works such as literature, music, cinematography, artistic endeavors, and so on. This will improve humans' ability to generate such works and feed their desire to participate in creative pursuits. And AI is used in numerous platforms across the globe for different purposes. In certain circumstances, we can claim that AI is assisting humans in accomplishing tasks more quickly, efficiently, and without making dumb mistakes because the technology we have today does not have emotions and stress to affect the work at hand as humans do.

However, the downsides of AI software are diametrically opposite to its benefits or advantages. It may appear to be a technique to corrupt human creativity, however, as AI software like Midjourney and ChatGPT evolve, the concept of originality might be the last thing humans can hold against other innovations as a foundation of human creativity. Since such technology can circumvent human mental power, humanity will no longer try to explore the true potential of the human brain and mental capacity. AI will be the ultimate choice for every possible work. Let it be homework, Art, what to wear, what to eat and the list goes on. These are some serious concerns that are currently taking place. I think AI-generated innovations should be Copyrightable if the AI is used as a tool to get the work done. In that way, it will encourage the programmers to innovate and at the same time there won't be gross production of AI art and oversharing of the same.

THE ECONOMIC IMPLICATION

With millions of paintings and drawings produced by AI algorithms, disruptive technologies such as artificial intelligence are revolutionizing the economics of the arts. As a result, human artists will struggle. Whether to accept the changing world or resist became the essential choice artists must make over the course of their careers. Artists face many challenges in adapting to this new environment, but they are not the only ones who must do it swiftly.³⁸ Uncontrolled sharing of AI-generated works will have serious effects on the economy, especially in the areas of art, painting, and images, where there is a high risk of a possible decline in the quality or originality of produced content due to the lack of legal recourse. This will eventually have an impact on global economic growth and competitiveness.

The recent usage of AI in creating art infuriated artists as people began incrementally commercializing the work. In contrast to human artists, AI takes only seconds to produce work after receiving a suggestion or prompt hence the potential for monetization was enormous. If this condition persists, there will be an imbalance between supply and demand, which would lead to the mass creation of AI-generated art and ultimately lower the value of original works of art.

And in late August 2022, Jason M. Allen won first place at the Colorado State Fair with an image called "Théâtre D'opéra Spatial"³⁹ created by the artificial intelligence program Midjourney. Yes, it competed against a little over a dozen other entries in a category for "Digitally manipulated photography"⁴⁰ in the arts. That triggered the public, expressing discontent, and voicing grave worries about the state of the art amid a time when there are programs like Midjourney, DALL-E 2,⁴¹ Imagen,⁴² and others that can respond to commands with images created from vast banks of visual content. And there were remarks like the problem wasn't the tech. The problem was the capitalists.⁴³

⁽³⁸⁾ Menéndez J, "AI-Generated Artwork Is Blowing Up The Economics of Art" (Medium, February 3, 2022) <https://medium.com/illumination/ai-generated-artwork-is-blowing-up-the-economics-of-art-e65f57a9b362> (Last accessed on 23 April 2023)

⁽³⁹⁾ Dans E, "It's AI: But Is It Art?" (Medium, October 25, 2022) <https://medium.com/enrique-dans/its-ai-but-is-it-art-fb7861e799af> (Last accessed on 24 April 2023)

⁽⁴⁰⁾ Dr. Thorsten S. Beck "HEADT Centre - Image Manipulation in Photo Competitions" (HEADT Centre - Image Manipulation in Photo Competitions) <https://headt.eu/Image-Manipulation-in-Photo-Competitions> (Last accessed on 24 April 2023)

⁽⁴¹⁾ "OpenAI DALL-E 2: The 200 Best Inventions of 2022" (Time, November 10, 2022) <https://time.com/collection/best-inventions-2022/6225486/dall-e-2/> (Last accessed on 24 April 2023)

⁽⁴²⁾ "Imagen - Personalized Photo Editing Assistant" (Imagen) <https://imagen-ai.com/>

⁽⁴³⁾ Cory Doctorow, "Science Fiction Is a Luddite Literature", Locus Magazine, January 3, 2022

Also more shockingly the paintings "Girl with a Pearl Earring"⁴⁴ by Johannes Vermeer and "A Girl with Glowing Earrings"⁴⁵ by Julian van Dieken are displayed side by side. A highly regarded Mauritshuis museum has declared that AI-generated art merits recognition as a legitimate kind of art, which is a major development for AI art. This has significant ramifications for how the public views AI art since a renowned museum accepts it as art, it must be art. The AI Art Renaissance has started, and this is a bold cultural statement.⁴⁶ As the argument about copyrightability, the world finds its way to commercialize AI-generated Art by monetizing and capitalizing the idea. As the era changed into digitalized and people slowly change their minds about how they view AI work, will copyright law also evolve?

CONCLUSION

The USCO stands strong with the decisions regarding AI-generated Art. This means that the policymakers need to come up with proper regulation and implement it, to control the above implications. A recommendation or suggestion to the problem at hand is to create alternative commercialization models, including licensing contracts or revenue-sharing agreements, like some of the AI tools or programs are already functioning on a subscription basis. Leaders in the industry, decision-makers, and other stakeholders will ultimately need to work together to address the economic implications of AI-generated work.

Journal of Legal Research and Juridical Sciences

⁽⁴⁴⁾ "Johannes Vermeer Girl with a Pearl Earring" (Johannes Vermeer Girl with a Pearl Earring | Mauritshuis) <https://www.mauritshuis.nl/en/our-collection/artworks/670-girl-with-a-pearl-earring/> (Last accessed on 24 April 2023)

⁽⁴⁵⁾ Eva Gabriella "Ethical or Not? The Mauritshuis Hangs Artwork Made by AI in Place of Loaned Vermeer" (DutchReview, February 23, 2023) <https://dutchreview.com/featured/ethical-or-not-the-mauritshuis-hangs-artwork-made-by-ai-in-place-of-loaned-vermeer/> (Last accessed on 24 April 2023)

⁽⁴⁶⁾ DelSignore P, "AI Art Is Now In A Famous Museum" (Medium, March 1, 2023) <https://generativeai.pub/ai-art-is-now-in-a-famous-museum-2072df54f5cd> (Last accessed on 24 April 2023)