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Qualifications: I am a Law Student at Regent Univesity School of Law who has dedicated considerable energy to researching the intersection of AI and the law – specifically in areas of legal drafting – as well as developing best practices and workflows for the use of AI in legal practice and research. I am also a hobbyist who intents to use AI-assisted workflows for the development of hopefully copyrightable materials.

AI IS AN IMPRESSIVE TOOL BUT NOT A PARADIME SHIFTING TECHNOLOGY

There is nothing in the current AI revolution that challenges current US copyright law. Concerns about AI's interaction with copyright law highlight broader issues within the law itself rather than problems unique to AI. The popular narrative around AI is filled with people who draw on sci-fi platitudes, predicting AI will usher in apocalypse or utopia. Then, use that view to suggest that AI is special and requires unique legal treatment.

At best, creating special rules for AI will only further overcomplicate an already intricate area of law and, at worse, hinder the creative and organic exploration of a new technology.

AI should be seen as an extension of existing technologies that US copyright law is already equipped to address. If that is true, then the issues of the copyrightability of AI-generated works are issues of copyright law generally. This comment on the Copyright Office notice of inquiry is not a robust recommendation of specific ways Congress can update the law, but rather a

recommendation that it be the habit of the copyright office and Congress to consider the "issue of the copyrightability of AI-generated works" not as an AI issue but as a copyright issue. AI has only highlighted possible already existent weaknesses in the law, if any problems do exist, and not presented a new set of challenges unfamiliar to the courts, congress, or the copyright office.

It would be useful to start with Thaler v. Perlmutter. The case exposed an interesting glitch in our adversarial legal systems: an obvious lie can be entered as a fact if neither party is incentivized to dispute it. Dr. Stephen Thaler had a "Creativity Machine." No doubt an image generator using similar, but worse, methods as DALL-E or Midjourny. The audacious lie that Dr. Stephen Thaler has injected into the legal logic of this conversation is the idea that these "machines," "algorithms," or just plain "bots" can create "art of its own accord."

The simple truth is that Dr Thaler or an agent of his had input. Either through the selecting of training materials, the building of the machine itself, the crafting of its prompt, or –if all else fails– the pushing of a button. I think we are safe to say Dr. Thaler's Creativtiy Machine is not God. It is not the "Unmoved Mover," it is not the self-turning wheel, and it is not the cause of its own effect. The core legal battle at the center of the case is so fundamentally wrong it becomes metaphysical.

The logic that (1) there was no human input and (2); therefore, there was no human authorship formed the core assumptions that led to the ruling against Dr. Thaler's attempt to codify non-human authorship. If he had

placed his own name as the author of the work, it is likely no legal flaw would exist.

Three things must happen for copyright to exist. (1) Originality of an (2) authored work (3) with fixation.

Dr. Thaler framed his case on the question of whether the US copyright office was right to require "human" authorship for copyright. Topics like "Should robots create movies?" “Which students are having ChatGPT write their essays?” and other questions of non-human authorship have dominated this area of debate.

The underlying assumption is that AI is capable of authorship and that its products have a distinct, non-human origin. While the nature of AI's creativity merits philosophical debate, it remains tangential to existing law. Regardless of AI's capabilities, human involvement with AI meets the required threshold of creativity for authorship and originality.

The case of Feist Publications, Inc., v. Rural Telephone Service Co., established in American law that a "modicum of creativity" is enough. Perhaps best illustrated in Burrow-Giles Lithographic Co. v. Sarony, the renowned photograph of Oscar Wilde highlighted the relatively minimal creative engagement needed. Factors such as lighting, shading, and timing contributed to the modicum. This minimum has reached a point of being microscopic. A defacto doctrine of “point and click” has more or less become the policy, evident in the acceptance of copyright for paparazzi photos, where mere presence near a celebrity seems to satisfy the minimal creative threshold.

Bleistein v. Donaldson Lithographing Company stood for the proposition that actual employment of that skill and, therefore, quality or good taste is also irrelevant, only that some creative judgment might be available to the author.

Here, I will present my attempt at the worst possible case for the copyrightability of an AI-generated work using chatgpt.

My Prompt:

“Please make a simple HTML game”

Here is its product:

https://sites.google.com/view/copyright-ai-demonstration/ai-game-a

(The link contains the game, the HTML code, as well as the full ChatGPT dialogue used in its creation.)

Some “creative input” was offered in spite of best efforts. I specified HTML as the coding language. I stated I wanted it to be simple. I asked for a game. Then I pressed a button to make the work both exist and become fixated.

The above game is analogous to a photo I might take of a tree outside my window, as they both equally owe their existence to me. I did very little past pointing myself in a direction, making a basic observation, and pressing a button. Put another way, Under the definition of an author as one "to whom a thing owes its origin," I am the author of both a game and a photo. AI's relation to US copyright isn't novel; the main legal question

it raises is the threshold of required creativity, which remains minimal.

None of this is to say that AI, by nature is this unfortunate “cheat” to our copyright system. Lazy photographers exist, and so do lazy AI-graphers. But it does not make AI or a camera anything less or more than a tool.

Here is a better case for the human authorship of AI-generated content.

Here is the link: https://sites.google.com/view/copyright-ai-demonstration/ai-game-b

(The link contains the game, the HTML code, as well as the full ChatGPT dialogue used in its creation.)

While I can’t praise the game's high quality, its human authorship is indisputable according to any reasonable estimation.

Just like before, not a single line of code was written, nor a single character changed, by a human hand. The only tool used was the conversation with chatgpt and its copy-and-paste function, which totaled nearly 79 pages of dialogue. A review of the conversation between myself and ChatGPT shows every single aspect of the game was dictated by me, but it is no less “AI generated.” Not high quality, not partially skilled, but nonetheless a modicum of creativity.

These two games are simple illustrations of a simple point: AI is a tool that can be used to make both copyrightable content, and

uncopyrightable content, depending on the ways it is used.

When Computer-Generated Images (CGI) emerged in the animation industry, much of the direct human touch was obscured. John Lasseter did not hand-paint Buzz Lightyear's plastic appearance. Instead, he and his studio designed a series of math equations. They gave these equations to a computer, which generated form them a set of polygons. Then, a separate algorithm developed a texture, likely a specialized "plastic" algorithm. Then, a different algorithm applied the texture to the polygons. When framed that way, it seems unjust that Pixar should have any credit at all, but that is all it is wrong framing.

To suggest that this algorithm has any authorship over Buzz Lightyear's copyright is clearly and unequivocally incorrect.

AI is reshaping countless domains, but it is pivotal to approach its implications with clarity and perspective. While it's tempting to perceive AI as an unprecedented challenge, in the context of copyright law, it's an extension of pre-existing and well-understood tools — merely more sophisticated. Just as the essence of a masterpiece is not the brush but the artist's vision, the core of AI-generated works remains rooted in human intent and direction, or authorship. The introduction of AI into the tool belt of the American creative does not create challenges to US copyright law, but highlights the issues that have long existed. These more fundamental issues will not be solved by the carving out of special exemptions for technologies that make the flaws more noticeable, but by looking at the whole.