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United States Copyright Office

Re: Notice of Inquiry on Artificial Intelligence and Copyright 59942 Fed. Reg., Vol. 88, No. 167

Interest of Commentator

Christa Laser is professor of law teaching intellectual property law and innovation policy. She envisions a world where law and legal regulation advance the progress of the arts and sciences. Prof. Laser has an interest in the efficient and fair functioning of legal institutions. She is also a photographer of landscape and abstract subjects for over ten years and as an artist has used both proprietary and open-source AI image-generation tools in her artwork.

Summary of Comments

The Copyright Office's approach of denying copyright registration to works created using generative artificial intelligence (AI) is inconsistent with courts' likely rules for eligibility:

- The Supreme Court's caselaw on then-new tools for creation supports a broad scope of eligibility without regard to means of creation.
- The Copyright Act and its legislative history eschew the means-of-creation assessment for eligibility.

The Copyright Office's current approach to copyrightability lacks fair administrability:

- The Copyright Office lacks the tools and time to conduct an examination process capable of fairly assessing the means of creation.

- The approach requires more information about the process of creation than most artists will retain evidence to support.

- The approach leaves space for dishonest actors to secure more rights than honest ones, where the Copyright Office lacks the tools available to courts for fairly assessing credibility.

- The Copyright Office could adopt a more moderate policy where it will only refuse to register works which on their face purport to be created without human authorship, an approach that would be consistent with *Thaler v. Perlmutter*.

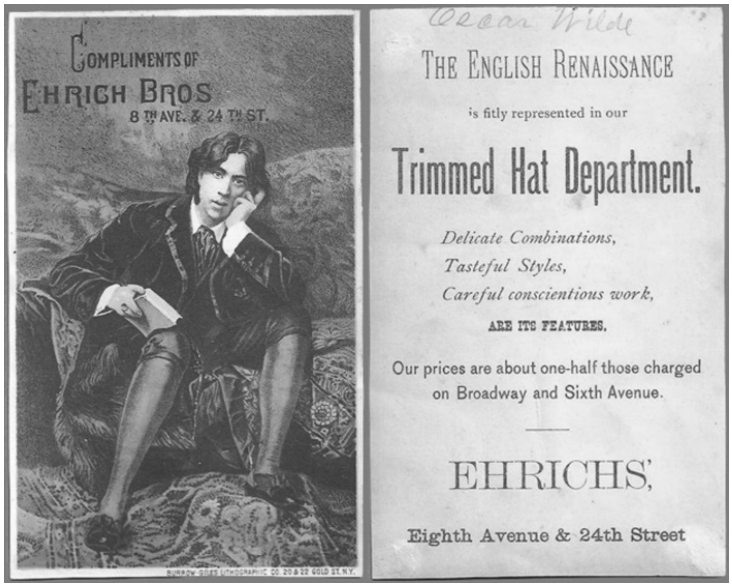
I. Courts Will Likely Find AI-Generated Works Eligible for Protection. The Copyright Office Should Adjust Its Practices and Grant Protection to AI-Generated Works

Courts are likely to view copyrightability of works created using new technological tools as expansive, as courts have done with most new technological tools of creation in the past. The question of whether copyright protections are available for art created using new technology is old. A prime historic example is how copyrights over photographs were treated after the invention of the camera.

In 1882, celebrity photographer Napoleon Sarony styled and took a photograph of Oscar Wilde, titled Oscar Wilde, No. 18. The public at the time widely viewed photography as merely the work of machine, not a tool for artistic vision. When a department store copied Sarony's photograph to sell hats, Sarony sued, arguing that photographs are expressions entitled to the same protections as paintings, novels, and any work implemented by human hand. In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), the Supreme Court agreed, stating that a photograph is protectable when it is the product of a person's

"intellectual invention," a work created from "fancy, or imagination." Courts accepted that cameras and later computers can serve as tools for artistic creation.

Oscar Wilde No. 18, Napoleon Sarony, 1882. Sarony carefully arranged the setting and Wilde's pose, then selected from 27 images.

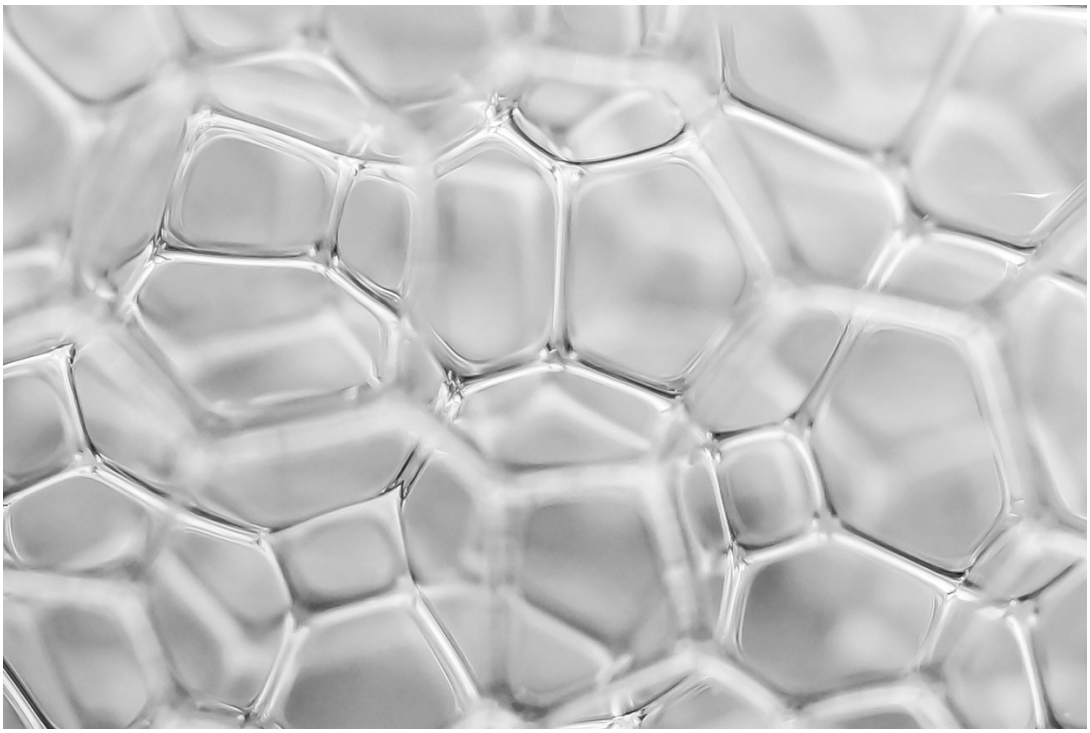


Ehrich Bros.'s advertisement for hats, copying Sarony's Oscar Wilde No. 18.

Under the U.S. Copyright Act, only "original works of authorship" are eligible for protection. 17 U.S. Code § 102. The edges of this requirement are hardly settled, but in *Feist Publications Inc. v. Rural Telephone Service Co*, Inc., 499 U.S. 340 (1991), a case regarding phone books, the Supreme Court held that a work must merely have a "modicum of creativity" and owe its expression to the "intellectual conceptions of the author" to be eligible.

When the U.S. Copyright Office denied copyright protection for Kashtanova's Midjourney-generated artwork, the Office found her work lacked the critical component of a human author. The Office described the process of image generation from AI prompts as one "not controlled by the user because it is not possible to predict," stating that a human does not "create" an image where a human only "influences" but cannot "dictate a specific result." Letter from U.S. Copyright Office, Zarya of the Dawn (Registration # VAu001480196), U.S. Copyright Off. (Feb. 21, 2023). The Copyright Office's Guidance on AI issued since then further emphasizes the need for human control and predictability. 88 Fed. Reg. 16190 (Mar. 16, 2023).

The Office's arguments could have been made just the same over one hundred years ago of Sarony's image of Wilde or many styled photoshoots today. As a hobbyist photographer and former model, I see final photographs emerge from a photographer's influence, trial, and selection, but rarely their full control. When I take a macro photograph of a water droplet, I have an idea of what I might like to capture and collect the tools to enable it, but the shape of the water and the bending of light around it is often chaotic and untamable. I rely on taking hundreds of images and selecting which to edit.



Water, Photograph by Christa Laser

Some of the best resulting images incorporate so many unpredicted events that it is nothing like what I envisioned when I set to the task. Human models are just as unpredictable as a water droplet. Even Sarony selected from 27 images to create Oscar Wilde No. 18. Visual art is made by harnessing forces inside and outside our control. The choice of a medium incorporating randomness is a creative choice, in photography as much as in AI art. When I created the AI-generated image below, I had more of an idea of the style and contents of the image before executing it than I often have when I photograph water droplets.

An AI-generated image by the author on DALL·E 2. "Lady Justice as a ballerina holding the Scales of Justice in the style of Hilaire-Germain-Edgar Degas."

Using prompt engineering techniques, AI artists can achieve remarkable control over the expressive elements of the work, such as lighting, pose, style, expressions, and setting. A few uses of generative AI employ random strings and undirected outcomes, but a more significant role of generative AI is to implement a human's extensive creativity, direction, and selection towards an outcome pre-dreamed in the human mind. Likewise, photographs were once scorned as mere works of machinery but were since recognized by the Supreme Court as an art form that expresses the vision of a human creator. Courts deciding copyrightability of AI art in the future are likely to look to cases like Sarony's photograph to find that copyright is available to protect any expression of the human mind, whether the ink is pressed by hand or machine.

The lesson to take from *Sarony* is that new technology is a tool of creation, and so long as it is the product of a person's "intellectual invention," a work created from "fancy, or imagination," the mechanics of its production should not matter. (The D.C. Circuit's recent decision is inapposite. *Thaler v. Perlmutter* did not find that AI-generated works were ineligible under a means-of-creation test. *See* Mem. Op., *Thaler v. Perlmutter*, No. 22-cv-1564,

ECF No. 24 (D.D.C. Aug. 18, 2023) (affirming that human authorship is required for copyright and registration cannot be granted where petitioner does not make any claim to human authorship in the administrative record).)

The Copyright Office's approach of finding that works created using AI tools are not human-authored is effectively a denial of copyright based on the medium of AI generation for expression. 17 U.S.C. 102 provides "(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, *now known or later developed*." As the house report leading to the creation of this statute indicated, this text was "intended to avoid the artificial and largely unjustifiable distinctions [in cases] under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed." H.R. Rep. No. 94-1476. Although this addressed fixation rather than authorship, the statute and history indicate that copyright should not be denied solely on the basis of the medium of expression, now known or later created, which should include use of computer technology and AI. A better mechanism to address concerns over the scope of the rights is to limit the scope for infringement purposes to the creative contributions of the human author than to deny rights entirely.

II. The Copyright Office Is Not Equipped to Conduct Thoughtful Examination of Eligibility Based on the Means of Creation.

The current approach to copyrightability of AI-generated works requires the Copyright Office to investigate the scope of human authorship in a way that will become more and more difficult as technology advances. The Office is not equipped to conduct full scale examinations of this topic.

Unscrupulous individuals will lie about creation–something that the Copyright Office's procedures are not as well-suited to address as courts–while honest applicants are denied registration. A registration system that depends for eligibility on an artist's account of the means of creation is unworkable. Copyright should be based on objective and measurable standards.

This requires an intimacy of information well beyond even patent examination, information fundamentally unknowable outside the mind of the artist. How much proof will be required of the means of creation? For example, will the Copyright Office begin requiring submission of all prompts and lists of edits, indicating parts crafted by human hand, parts edited with and without tools, whether those tools use algorithms or AI, parts in-painted or extended or cropped? Will less sophisticated artists be able to maintain these standards? Will those who do not know to do so lose their rights, favoring larger and more sophisticated repeat players in the digital art market? Will the Copyright Office or any court be able to tell if an artist is lying about the extent of human involvement if the artist uses tools that do not keep such detailed records as the Copyright Office would demand? The copyright office should err on the side of registrability. The numerous logistical problems with managing a means-of-creation eligibility standard should caution the Copyright Office to not make any such standard a threshold to registration.

The Copyright Office could adopt a more measured approach: the Copyright Office could adopt a policy where it will only refuse to register works which on their face purport to be created without human authorship. This would solve the logistical and policy concerns raised above. If a work claims a human author and creative contribution, the Copyright Office would not further examine the means of creation as a basis for denial. This measured approach would be consistent with the D.C. Circuit's opinion: when an application purports on its face to involve no human author, it is not eligible for protection. Notably, the D.C. Circuit's opinion rested solely on the requirement for authorship under the Constitution and the applicant's failure to claim any human author (indeed, applicant's disclaimer of human authorship) in the administrative proceeding.

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