Machine-Crafted Masterpieces: Analyzing the Legal Consequences of Artificial Intelligence Art on United States Copyright Law

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I. INTRODUCTION

The future of artificial intelligence (AI) is unpredictable.[1] AI programs can write local news articles and novels, create digital artwork, and generate music.[2] The growth of AI programs in these areas undeniably implicates the intellectual property rights associated with creative works,[3] and it is uncertain what ramifications AI programs will have on the intellectual property rights of individuals who use these programs to create art.

This Note focuses on the legal consequences that United States copyright law will encounter as it pertains to the visual artworks created with the assistance of AI programs. Specifically, this Note will focus on AI programs such as DALL-E 2, DALL-E 3, OpenAI, Bing Image Creator, and NightCafe, a few of the most popular AI art generators in the world.[4] The discussion begins with an overview of the history of United States copyright law and how it has adapted over time to integrate different technological advancements. Next, this Note explains the United States Copyright Office's (USCO) position regarding works created with AI programs and the relevant case law that may be applicable to quasi-AI-generated art. This Note then addresses the relevant contractual issues that arise with AI programs' terms of use agreements, the different perspectives on the ownership of quasi-AI-generated artwork, and the solutions that some foreign nations created to solve the problem of ownership over AI-generated artwork. Overall, this Note will discuss the issues that exist with the growth of AI generated content, analyze how AI art intertwines with United States copyright law, and present recommendations that assist in solving copyright ownership over quasi-AI-generated artwork.

II. BACKGROUND

a. The History of U.S. Copyright Law and Technology

1. The Beginning of U.S. Copyright Law

In 1790, Article I, Section 8 of the United States Constitution was adopted.[5] This section included Clause 8, which states, "[Congress shall have the Power] . . . 'To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and

1. Bhopi Dhall & Saurajit Kanungo, *Will AI Take Over the World? Or Will You Take Charge of Your World?*, FORBES (July 17, 2023), https://www.forbes.com/sites/forbesbooksauthors/2023/07/17/will-ai-take-over-the-world-or-will-you-take-charge-of-your-world/ [https://perma.cc/U9J5-7DWV].

2. Andres Guadamuz, *Artificial Intelligence and Copyright*, WORLD INTELL. PROP. ORG. (Oct. 1, 2017), https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html [https://perma.cc/AL2A-5Y2T].

3. *Artificial Intelligence and Intellectual Property Policy*, WORLD INTELL. PROP. ORG., https://www.wipo.int/about-ip/en/artificial_intelligence/policy.html [https://perma.cc/9U9N-JD97].

4. Harry Guinness, *The 30+ Top AI Art Generators*, ZAPIER (Apr. 2, 2025), https://zapier.com/blog/ai-art-generator/ [https://perma.cc/G2S2-U7FV]; Guadamuz, *supra* note 2.

5. *A Brief History of Copyright in the United States*, U.S. COPYRIGHT OFF., https://copyright.gov./timeline/ [https://perma.cc/PQ8S-JU4J].

Inventors the exclusive Right to their respective Writings and Discoveries.'"[6] This clause was established in U.S. law as the principle that an author of a work may reap the fruits of their intellectual creativity for a limited period of time.[7] Article I, Section 8, Clause 8 includes the rights attributable to copyrightable materials.[8]

Copyright law protects original works of authorship, including pictorial, graphic, audiovisual, literary works, and many others.[9] Furthermore, copyright law provides authors with the exclusive right to reproduce and distribute his or her work, the right to publicly perform or display the work, and the sole right to grant others a license to engage in these activities.[10] Additionally, a copyright owner also has the exclusive right to create derivative works or to authorize another person to do so.[11] Once a work obtains copyright protection, the duration of copyright protection may vary, depending on various copyright law doctrines.[12] Works created after January 1, 1978 enjoy, "copyright protection [] for the life of the author plus an additional 70 years."[13] Works created under the work-made-for-hire doctrine enjoy copyright protection, "for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first."[14] Works published prior to 1978 have copyright protection lengths that take many other factors into account.[15] Taken as a whole, U.S. copyright law has granted copyright owners generous exclusive rights in their creations.

2. The Theoretical Justifications for Copyright Protection

The Founders of the United States wanted to "reward innovation and creative works"[16] so to accomplish this goal, the "Intellectual Property Clause" was embedded into the United States Constitution.[17] It is important to understand why the Founders wanted to recognize legal rights in creative expression, which requires an explanation of the theoretical frameworks that prompted the creation of copyright law. There are three theoretical frameworks that exist in the sphere of intellectual property law and each help explain the justifications for the extensive rights U.S. copyright law affords to copyright owners: labor theory, personality theory, and utilitarianism theory.

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6. U.S. CONST. art. I, § 8, cl. 8.
7. U.S. COPYRIGHT OFF., *supra* note 5.
8. U.S. CONST. art. I, § 8, cl. 8.
9. *Id.*
10. *Id.*
11. U.S. COPYRIGHT OFF., COPYRIGHT IN DERIVATIVE WORKS AND COMPILATIONS 2 (2020), https://www.copyright.gov/circs/circ14.pdf [https://perma.cc/4DRT-6KTM].
12. *How Long Does Copyright Protection Last?*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/faq-duration.html [https://perma.cc/6RXZ-EMSS].
13. *Id.*
14. *Id.*
15. *Id.* However, it is not necessary to discuss those rules because art-generating AI programs did not exist before 1978.
16. Charles R. Neff, *Disclose on the Dotted Line: Artificial Intelligence as an Inventor in the U.S. Patent System*, 48 J. CORP. L. 899, 902 (2023).
17. *Id.*; Aldon Abbott, *The Constitutionalist and Utilitarian Justifications for Strong U.S. Patent and Copyright Systems*, HERITAGE FOUND. (June 21, 2016), http://report.heritage.org/lm179 [https://perma.cc/H3B2-J3VL].

First, labor theory justifies exclusive rights over copyrightable material based on "the underlying intuition that we are *sometimes, in some sense* morally entitled to the fruits of our labor . . . ."[18] John Locke, the creator of this theory, "notes that anyone who meddles with the fruits of another's labor thereby seeks 'the benefit of another's pains, which he had no right to.'"[19] Under this theory, the reason for granting exclusive copyright protection to authors is that the "law ought to give authors what they deserve; in other words, hard work should be rewarded and authors should retain control of the fruits of their labors."[20] Simply put, it is important to give credit where credit is due.

Second, personality theory focuses on the emotional bond between the artist and the art they create.[21] Although this theory is less prevalent in U.S. jurisprudence than labor theory, it has still found a place in justifying an author's exclusive right to the work they created.[22] Courts take personality claims in copyright to mean that an intangible element "points to a supposed 'connection' or 'bond' between the author and the work, which is normally characterized as 'permanent' and 'indissoluble.'"[23] Under this theory, exclusive rights to copyright protection in a given work result from the unique personality of each creator.[24]

The third theory, utilitarianism, takes a different approach to explain why copyright protection should be granted to an author's work. The utilitarian justification for granting copyright protection to authors who create artwork is that granting copyright protection in creative works helps society progress.[25] In other words, by granting exclusive rights in copyrightable material, the utilitarian justification is that it helps society progress by eliminating the ability of others to copy off the original and have the same rights as the original creator. The utilitarian view of copyright is that "copyright exists to promote the progress of science and the useful arts."[26] This theoretical justification is important to recognize because it can be used as a justification for granting exclusive rights in copyrightable material, however, it will not be the primary justification behind this Note's explanation of copyright protection to AI-generated creative expression.

3. Entering the Era of Technology

The introduction of new technology into society provided a new way to share creative expression.[27] This is arguably a positive change for society as it encourages the free flow

18. Mala Chatterjee, *Lockean Copyright Versus Lockean Property*, 12 J. LEGAL ANALYSIS 136, 137 (2020).

19. *Id.* at 144.

20. Jessica Meindertsma, *Theories of Copyright*, THE OHIO STATE UNIV. (May 9, 2014), https://library.osu.edu/site/copyright/2014/05/09/theories-of-copyright [https://perma.cc/58LW-DPLZ].

21. *Id.*

22. Maurizio Borghi, *Hegel's Theory of Personality in Copyright Law: Questioning the Dominant (Anglo-American) Paradigm*, 32 ANNALI ITALIANI DEL DIRITTO D'AUTORE DELLA CULTURAE E DELLO SPETTACOLO [ITALIAN ANNALS OF COPYRIGHT CULTURE & ENTERTAINMENT] 463, 467 (2023).

23. *Id.* at 469.

24. *Id.*

25. Patrick R. Goold & David A. Simon, *On Copyright Utilitarianism*, 99 IND. L.J. 721, 749–51 (2024).

26. *Id.* at 725.

27. George Thuronyi, *Copyright Law and New Technologies: A Long and Complex Relationship*, LIBR. CONG. BLOGS (May 22, 2017), https://blogs.loc.gov/copyright/2017/05/copyright-law-and-new-technologies-a-long-and-complex-relationship/ [https://perma.cc/67C8-GEQ4].

of ideas and creative works within the nation and around the world. However, "new" technologies are known to disrupt traditional copyright regimes, such as, "[the] radio (1920s and 1930s), cable television (1960s and 1970s), photocopying (1970s), home video cassette recorders (1970s and 1980s), and . . . digital downloading and streaming technology (today)."[28] Not one of the listed technological developments has required the courts to encounter a situation where technology was creating its "own" creative expressions. AI is a technological advancement that can create artwork based on the input of text. Thus, in some sense, AI has the capacity to create creative expression on its "own." This advancement in our society is novel and leads this Note into the discussion of the impact that AI programs will have in the realm of copyright law and the downstream legal consequences that will follow from this technological invention.

b. Where We Are Now

1. The "Human Authorship Requirement"

The USCO has stated that it will "register an original work of authorship, provided that the work was created by a human being."[29] The reason for the "human authorship requirement" is that copyright law only protects the "'fruits of intellectual labor' that 'are founded in the creative powers of the mind.'"[30] The USCO will not register a copyright claim if it determines that a human was not the creator of the work.[31] Additionally, courts have also declined to extend copyright protection to authors who are not human.[32]

2. When Does Copyright Protection Attach?

It is not required that a work be registered with the USCO to be protected by copyright law.[33] Once an original work is created in a tangible medium, such as painting a picture on canvas, typing a short story in a Word document, or recording yourself singing, you become the author and owner of that work (given that the creation also satisfies the copyrightable subject matter qualifications of 17 U.S.C. 102(b)).[34] It is true that registering a creative work with the USCO affords an author extra protection, such as providing public notice that someone has claimed copyright protection over their specific work.[35] However, registration is not a necessary component to grant copyright protection in creative expression. Therefore, although the USCO and U.S. courts refuse to grant copyright protection to non-human authors under the "human authorship requirement," non-registered works created with AI programs may still be considered copyrightable even without USCO approval.

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28. *Id.*

29. U.S. COPYRIGHT OFF., COPYRIGHTABLE AUTHORSHIP: WHAT CAN BE REGISTERED 7 (2021).

30. *Id.*; Trade-Mark Cases, 100 U.S. 82, 94 (1879).

31. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57–58 (1884).

32. CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., LSB10922, GENERATIVE ARTIFICIAL INTELLIGENCE AND COPYRIGHT LAW 1–2 (2025); Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018). For the sake of restraining the scope of this Note to artistic works created by humans with the assistance of AI programs, this Note will not further explore what "creator" or "author" truly means.

33. *What Is Copyright?*, U.S. COPYRIGHT OFF., https://www.copyright.gov/what-is-copyright/ [https://perma.cc/8RF5-VE7L].

34. *Id.*

35. *Id.*

Moreover, there is also the possibility that U.S. courts, USCO, or both, may change its position on the "human authorship requirement" as AI systems evolve. Thus, the question still stands as to whether works generated by humans with the assistance of AI programs are entitled to copyright protection.[36]

3. Different Approaches to Authorship in Quasi-AI Generated Works

There are multiple approaches to determine the correct allocation of rights in "quasi-AI-generated works." The following approaches will be discussed: (1) rights should be allocated to the owner of the AI program; (2) the AI system should be allocated the rights to its output; (3) the AI system and the user should share joint authorship; and (4) the works should belong to the public domain and, essentially, belong to no one at all.

i. The AI Programmers

The first approach is that copyright protection should be designated to the programmers who created the algorithm for the AI program. Depending on how advanced an AI program is, the owners of that program should retain at least some ownership rights in the output their algorithm produces.[37] The "quantity and quality of the data used to train an algorithm play a crucial role in determining the accuracy and quality (and therefore the value) of the algorithm itself, and the outputs of an algorithm can vary significantly based on the data on which the algorithm performs."[38] Furthermore, this approach recognizes that AI is a tool created by the individual or organization that owns the AI software, thus, any output it produces should belong to them as well.[39]

ii. The AI Program Itself

The second option is to attribute authorship to the AI program itself.[40] The AI system itself should be the author of its output because the AI program has "actual control over the production process."[41] Moreover, it is no secret that AI programs will advance, and that AI is continuing to develop into an ever-increasing autonomous entity.[42] Because AI is developing at such a quick rate, there is more reason to attribute authorship to AI system itself.[43] One reason for this view is that the "agency aspect of AI will gain prominence" and the "tool-like aspect will diminish."[44] Thus, the supporters of this approach believe that since the Constitution "mandates that only authors are entitled to copyright protection,

36. ZIRPOLI, *supra* note 32, at 2–3.

37. Samantha Fink Hedrick, *I 'Think' Therefore I Create: Claiming Copyright in the Outputs of Algorithms*, 8 N.Y.U J. INTELL. PROP. & ENT. L. 324, 348 (2019).

38. *Id.*

39. *The Ownership Dilemma: Who Owns Building Design in the Age of AI?*, AIA CONT. DOCUMENTS (May 22, 2024), https://learn.aiacontracts.com/articles/the-ownership-dilemma-who-owns-building-design-in-the-age-of-ai/ [https://perma.cc/9PHD-DWBL].

40. Ioan-Radu Motoarcă, *AI, Copyright, and Pseudo Art*, 26 YALE J.L. & TECH. 431, 481 (2024).

41. *Id.* at 475.

42. *Id.* at 481.

43. *Id.*

44. *Id.*

the only entity entitled to have copyright protection in the AI-generated work is the AI itself" because it is the entity with total control over the output.[45]

Many supporters of this approach cite to the Supreme Court case *Burrow-Giles Lithographic Co. v. Sarony* to bolster their argument that the AI system should be granted copyright protection in the artwork it creates.[46] The Court in *Sarony* held that photographs produced by photographers who make decisions "regarding creative elements such as composition, arrangement, and lighting" are protectable by copyright.[47] Those who argue that the AI system should be granted copyright protection in the output it creates look to the Court's opinion *Sarony* to allege that authorship should vest in the AI system.[48]

The first takeaway from *Sarony* is that an "author is identified as that entity which is the primary cause of the work coming into existence."[49] The second takeaway is the "overseer conception" of an author, which stresses that the "author" of a work depends on the degree of control exercised over the final product.[50] The second takeaway is most important in complex cases, such as quasi-AI generated works, where several agents are a part of the causal roles in creating a work of art.[51]

Additionally, it is notable that the USCO has made clear that users who "feed" prompts to the AI system to create images are not automatically the authors of the generated images.[52]Thus, under this view, the AI system itself should be allocated full authorship rights in the works generated from its programs. What follows from this is: if the artwork satisfies all of the other requirements of copyrightable material (i.e., originality and modicum of creativity), then the AI system should be granted the copyright protection in those works, not the user.

iii. Joint Authorship in Quasi-AI Generated Works

The third option would be to grant joint authorship to the AI program as an independent entity, and the user who used the AI program to create the work.[53] The Ninth Circuit held in *Aalmuhammed v. Lee* that a "human who 'superintends' the process, or whose 'original intellectual conceptions' the work embodies," owns the copyright even though other humans "actively ma[d]e creative choices and add[ed] their own original and creative contributions to the work as a whole."[54] This holding stands unless there is an express intention to be engaged in joint authorship.[55] The argument is as follows: "if the AI, as an independent entity, is granted copyright in the ultimate work, there is a strong argument that the . . . user will have also made substantial contributions to the work."[56] Thus, using

45. Motoarcă, *supra* note 40, at 481–82.
46. *Id.* at 463.
47. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884); ZIRPOLI, *supra* note 32, at 2.
48. Motoarcă, *supra* note 40, at 460–61.
49. *Id.* at 463.
50. *Id.* at 464.
51. *Id.* at 469.
52. *See id.* at 477 (noting that images created for the book *Zarya of the Dawn* were not copyrightable because they were created by the AI program, Midjourney. The United States Copyright Office states that it was "clear that it was Midjourney . . . that originated the 'traditional elements of authorship' in the images").
53. Hedrick, *supra* note 37, at 349.
54. *Id.* at 342; Aalmuhammed v. Lee, 202 F.3d 1227, 1234 (9th Cir. 2000).
55. Hedrick, *supra* note 37, at 342.
56. *Id.* at 349.

the *Aalmuhammed* test to grant joint authorship to the user and the AI system, the court would determine if either party (the user or the AI entity) was (1) a "superintendent" in creating the work, (2) whether both the user and the AI entity manifested an intent to become co-authors, and (3) whether the audience appeal of the work turns on the contributions of both the AI system and the human user.[57]

iv. Let It Remain in the Public Domain

Another view held by some authors is that no one should hold copyright ownership over quasi-AI-generated works. Under this approach, quasi-AI-generated artwork would remain in the public domain.[58] This is the option that the United States has adopted. Once AI art is created, it enters the public domain because the courts and USCO have not afforded AI art copyright protections.[59] The primary concern with this approach is that the "recycling" of AI art images back into AI systems undermines the policy goals of copyright law.[60] The problem is that creative artwork generated from AI systems is being stripped of the opportunity to enjoy copyright protection and is instead available for all to use without express permission.[61]

v. The User Owns It All

The is a final option regarding the allocation of rights in quasi-AI-generated works consists of the rights belonging solely to the user. This option implicates the licensing and contractual agreements of the AI systems; therefore, this component will be discussed in Part IV of this Note.

c. International Approaches

Many foreign nations started to create legislation to deal with the allocation of authorship to AI programs. The United Kingdom and China developed different approaches to accommodate the increase in AI-generated artwork.

1. The United Kingdom Approach

The United Kingdom passed the UK Copyright and Patents Act (CDPA) in 1988.[62] Section 178 of the CDPA "enables copyright protection to works generated by a computer when there is no human author of the work."[63] However, in the U.K. copyright cannot vest in non-human actors, so the "resulting author of a computer-generated work is the person

57. Aalmuhammed v. Lee, 202 F.3d 1227, 1232–34 (2000); Jennifer Yamin, *Analyzing* Aalmuhammed v. Lee *in the Context of Entertainment Industry Employment*, 8 J. INTELL. PROP. & ENT. L. 93, 93 (2018).

58. Hedrick, *supra* note 37, at 349–50.

59. Mackenzie Caldwell, Note, *What Is an 'Author'?—Copyright Authorship of AI Art Through a Philosophical Lens*, 61 HOUS. L. REV. 411, 413 (2023).

60. *Id.* at 439.

61. *Id.*

62. Kristofer Erickson, *Copyright Protection in AI-Generated Works*, CREATIVE INDUS. POL'Y & EVIDENCE CTR. (Jan. 31, 2024), https://pec.ac.uk/blog_entries/copyright-protection-in-ai-generated-works/ [https://perma.cc/HR8M-9ZL2].

63. *Id.*

'by whom the arrangements necessary for the creation for the work are undertaken.'"[64] In such circumstances where a quasi-AI-generated work has been created, the copyright term is 50 years.[65] There is ambiguity created by this statute in terms of what it means to make a sufficient amount of "arrangements." The language of the CDPA is not clear as to whether a human author must exhibit the same skill, labor, and judgment needed to meet the originality requirement that applies for copyright protection in traditional works.[66] Additionally, the CDPA is also ambiguous in the statute's failure to distinguish between "computer-generated and computer-assisted work."[67] The lack of distinction between the two categories may have grave effects for quasi-AI-generated works. The question to consider in interpreting this ambiguity is "to what extent must the computer act alone, without input from a human in order for a work to be considered computer-generated, rather than a work of traditional human authorship?"[68]

2. The China Approach

In China there has not yet been an explicit protection for AI-generated art.[69] Chinese courts have held that so long as the copyrightable material has satisfied the requirements for copyright protection and that there was "sufficient human involvement in the creative process," it is possible to be protected by copyright.[70] Recently, the Beijing Internet Court (BIC) "recognized copyright protection in artificial intelligence (AI) generated images."[71] In *Li v. Liu*, the court "rul[ed] that the images met the requirements of originality and reflected a human's intellectual property investment."[72] The BIC held that "the author put in a certain amount of intellectual investment, such as designing the presentation of characters, selecting and arranging the prompt, and setting relevant parameters," which was sufficient to establish copyright protection.[73] China has further refined its originality requirements in terms of AI generated art by clarifying that "if the same work can be created by different people following a fixed set of procedure, formula or structure, then it cannot be original."[74] In other words, the more specific the prompts are, the more indicative it is that the work displays the human author's original expression of ideas.[75] Additionally, on the

64. *Id.*
65. *Id.*
66. *Id.*
67. Erickson, *supra* note 62.
68. *Id.*
69. Inyoung Cheong, *AI Art: The US, UK, and China Take Different Approaches to Copyright Protection*, MEDIUM (Dec. 14, 2022), https://medium.com/@inyoungcheong/ai-art-the-us-uk-and-china-take-different-approaches-to-copyright-protection-9678e93a795d [https://perma.cc/SRS4-9R58].
70. *Id.*
71. Rahul Kapoor & Katrina Slack, *Beijing Court Approves Copyright Protection for AI-Generated Images*, MORGAN LEWIS (Jan. 5, 2024), https://www.morganlewis.com/blogs/sourcingatmorganlewis/2024/01/beijing-court-approves-copyright-protection-for-ai-generated-images [https://perma.cc/FRM2-V95P].
72. *Id.*
73. *Id.*
74. Loke-Khoon Tan & Harrods Wong, *China: A Landmark Court Ruling on Copyright Protection for AI-Generated Works*, GLOB. LITIG. NEWS (May 8, 2024), https://globallitigationnews.bakermckenzie.com/2024/05/08/china-a-landmark-court-ruling-on-copyright-protection-for-ai-generated-works/ [https://perma.cc/599X-5KL4].
75. *Id.*

issue of copyright ownership, Chinese courts have established that China's copyright law "shall be owned by the author of the work (which can be a natural person, legal person, or an unincorporated association), and **an AI model cannot be an author (and hence a copyright owner)**."[76] Overall, China's approach to AI-generated works will be determined by Chinese courts on a case-by-case basis, but the rulings thus far suggest that China is prepared to recognize the copyrightable nature of AI-generated works.[77]

d. The Contract Question

Many AI systems have terms of use sections that govern the rights a user has in the artwork they generate from the program. For example, OpenAI stipulates that "[a]s between you and OpenAI . . . you (a) retain your ownership rights in Input and (b) own the Output. We hereby assign to you all our right, title, and interest, if any, in and to Output."[78] This language appears in many other AI programs' terms of use statements, and it is extremely cautious.[79] Here, "OpenAI seems to cleverly bypass most copyright questions through contract."[80] These types of terms of service agreements leave many important copyright questions unanswered. For example, there is no clear answer on the right to create derivative works from the art generated from the AI system. The lack of clarification on derivative works could create issues depending on whether courts determine that quasi-AI-generated works are, in fact, copyrightable. This is because the same terms of use agreements state that they may use your content to "provide, maintain, develop, and improve" their services.[81]

III. ANALYSIS

a. The Future Complications Created by AI Generated Works

There are various issues that come to mind when analyzing the uncertainty of the future of AI-generated works.[82] A few include copyright infringement and rights of use issues, confusion about ownership of AI-generated works, and questions regarding unlicensed content in training data.[83] This Part addresses the uncertainty of ownership of AI-generated artworks and the possible consequences that will arise from the unpredictable and inconsistent nature of AI.

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76. *Id.*

77. *Id.*

78. *Terms of Use*, OPENAI (Dec. 11, 2024), https://openai.com/policies/terms-of-use/ [https://perma.cc/69NZ-EG86].

79. Leslie Alan Horvitz, *How Artificial Intelligence Challenges the Concept of Authorship*, INDEP. MEDIA INST. (Aug. 24, 2024), https://egbertowillies.com/2024/08/24/how-artificial-intelligence-challenges-the-concept-of-authorship/ [https://perma.cc/3549-DT6A].

80. Anisha Sircar, *Who Owns AI Output? Why Recent Cases Against OpenAI Could Redefine Copyright*, FORBES (Jan. 27, 2025), https://www.forbes.com/sites/anishasircar/2025/01/27/who-owns-ai-output-why-recent-cases-against-openai-could-redefine-copyright/ [https://perma.cc/YY87-EFSK].

81. OPENAI, *supra* note 78.

82. Gil Appel, Juliana Neelbauer & David A. Schweidel, *Generative AI Has an Intellectual Property Problem*, HARV. BUS. REV. (Apr. 7, 2023), https://hbr.org/2023/04/generative-ai-has-an-intellectual-property-problem [https://perma.cc/8EPS-Q87K].

83. *Id.*

First, this section will discuss the potential for copyright protection to vest in AI programs by analyzing quasi-AI-generated works under the "work-made-for-hire" doctrine. Second, this Part also explores an outline of the copyright analysis that would apply given the nature and composition of quasi-AI-generated works.

b. The Ways Around "Human Authorship Requirement"

There may be ways around the "human authorship requirement" that create avenues for copyright protection to partially vest in the AI program itself.[84] It is important to note that the Copyright Act does not define "author."[85] Rather, 17 U.S.C. § 102(a) states vaguely that "copyright protection subsists . . . in original works of authorship."[86] The general requirement "that a work must be authored has remained consistent throughout U.S. copyright law history, [but] who that author is has been anything but consistent."[87] Thus far, authorship has been extended to mean "the publisher," "the creative genius," and "communal authorship."[88] Therefore, based on the ambiguous nature of 17 U.S.C. § 102(a), the question of what an "author" means solely based on the statute is left open. However, as stated above, U.S. courts and the USCO are of the opinion that "author" only means.[89] Thus, this Part will proceed by discussing ways to attribute copyright protection to quasi-AI-generated works absent an authorship analysis.

Although it is doubtful that the USCO, or the courts, would grant full copyright protection to the AI program, it is entirely possible to grant co-authorship in a copyrightable work: "[j]oint authors, in the absence of agreement to the contrary, share equal and undivided ownership of the joint work."[90] The key component of a joint work is when there has been a collaborative effort to create one single work.[91] Thus, copyright law vests equally within each contributor.[92]

Joint authorship may be granted to AI programs based upon the "work-made-for-hire" doctrine.[93] The "work-made-for-hire" doctrine allows for joint authorship of a copyrightable work where one "owner" is a corporate entity, and another is an individual.[94] There are two ways to establish "work-made-for-hire": (1) if "a work [is] prepared by an employee within the scope of [their] employment"; and (2) a freelancer (independent contractor) and publisher (employer) agree in writing that the work shall be considered a "work-

84. *See* 17 U.S.C. § 102(a) (authorizing copyright protection for works authored with the aid of a machine or device).

85. Caldwell, *supra* note 59, at 413.

86. 17 U.S.C. § 102(a).

87. Caldwell, *supra* note 59, at 413.

88. *Id.*

89. *See supra* notes 29–32 and accompanying text.

90. U.S. COPYRIGHT OFF., VIEWS OF THE UNITED STATES COPYRIGHT OFFICE CONCERNING PRO LICENSING OF JOINTLY OWNED WORKS 6 (2016), https://www.copyright.gov/policy/pro-licensing.pdf [https://perma.cc/E482-54DJ].

91. *See id.* (explaining that in a joint work "where three songwriters intend to, and do, collaborate on a single musical work, copyright law vests each songwriter with an undivided one-third interest in the copyright for the entire work").

92. *Id.*

93. *Joint Authorship and Collective Works*, UNIV. CAL. COPYRIGHT, https://copyright.universityofcalifornia.edu/ownership/joint-works.html [https://perma.cc/NLV2-QHBU].

94. *Id.*

made-for-hire."[95] The leading case that outlines the "works-made-for-hire" doctrine and the implications it has for copyright attachment for works created by individuals under the guise of "employment" is *Community for Creative Non-Violence v. Reid*.[96]

In *Reid*, the Court determined that the term "employee" in the "work-made-for-hire" doctrine "should be understood in light of the general common law of agency."[97] A principal-agent relationship is created when an agent is given the authority to act for the principal.[98] The Court established that in determining whether a hired party is an employee under agency law, courts should "consider the hiring party's right to control the manner and means by which the product is accomplished."[99] Some of the factors the Court considers in this inquiry are: "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; . . . and whether the work is part of the regular business of the hiring party."[100] While courts consider other factors, those listed above are the most relevant to the discussion of joint-authorship over quasi-AI-generated art. In *Reid*, the Court also emphasized that no single factor is determinative, meaning each must be given equal weight in the joint-authorship analysis.[101]

If the court determines that more factors weigh in favor of considering the relationship to be employer-employee, the employer is considered to be the author and will also own the copyright in the work.[102] If the court determines the factors weigh in favor of a hiring party-independent contractor relationship, then the type of work must (1) fall within the categories of "specifically ordered or commissioned" works as prescribed by 17 U.S.C. 101(2), (2) there must be a written agreement between the hiring party and the individual who created the work, (3) the written agreement must expressly state that the work is to be considered a "work-made-for-hire," and (4) both parties must sign the agreement.[103]

c. Application of Reid *to AI Programs*

Based on the above factors from *Reid*, there are several potential outcomes: (1) the user is considered an employee, (2) the AI program is considered an employee, (3) the user is considered an independent contractor, or (4) the AI program owner and the individual user become "joint authors."[104]

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95. 17 U.S.C. § 101(C)(1)–(2); *Copyright Ownership: The Work Made for Hire Doctrine I*, FINDLAW (Mar. 26, 2008), https://corporate.findlaw.com/intellectual-property/copyright-ownership-the-work-made-for-hire-doctrine-i.html [https://perma.cc/FKF2-BGF7].

96. *See e.g.*, Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

97. *Id.* at 740–41.

98. *Agency*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/agency [https://perma.cc/37Z2-UCLH].

99. *Reid*, 490 U.S. at 751.

100. *Id.* at 751–52.

101. *Id.* at 752.

102. U.S. COPYRIGHT OFF., WORKS MADE FOR HIRE 1 (2024), https://copyright.gov/circs/circ30.pdf [https://perma.cc/D4XH-HSVN].

103. Circular 30, *Works Made For Hire*, 2 https://copyright.gov/circs/circ30.pdf [https://perma.cc/Q9F3-L2YR].

104. RESTATEMENT (SECOND) OF AGENCY § 1 (AM. L. INST. 1958) (To proceed with an employee-employer based argument for either the user or the AI program, the concept of agency must be defined. An agency relationship is one that "results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.").

1. The User as an Employee

It must be shown that the user is an agent of the principal (AI program) if the user is to be considered an employee of the AI program. This application is complicated because it must be established that the user is subject to the AI program's control and is acting on the AI program's behalf. Most AI programs function by the user inputting instructions for the AI program to follow.[105] After the user tells the AI program what to do, an image is created. Thus, it is hard to say that the user is the agent of the AI program when the user is instructing and controlling the AI program to do what they want it to do.

Although it is unlikely that an agency relationship can be established where the user is the agent, it is still helpful to outline the *Reid* factors that weigh in favor of a user becoming an employee of an AI program. AI programs may become more advanced in the future, where the AI program takes a more active role in controlling the user's actions.[106] The factors that weigh in favor of the user becoming an employee are: the skill required; the tools and instrumentalities used in creating the work; and the work being a part of the regular business of the hiring party.[107] These factors weigh in favor of the AI program being the "employer" because the tools and instrumentalities include the algorithm the program uses to produce the digital work, the database of art it draws upon to create the new work, and providing the interface for the user to communicate with the AI generator. Moreover, programs such as DALL-E and Microsoft Bing Image Creator are in the sole business of creating digital images.[108] Lastly, the skill required may weigh in favor of the AI program being the employer because the AI generator, in creating a digital work, accesses vast amounts of data, analyzes the prompts it has been given, and then produces an image that the user has asked for.[109] Arguably, this process is more skillful than writing a prompt or prompts asking the AI program for an image. Additionally, it is also important to recognize that the AI system's programmer may be viewed as the true axis of skill. Without the skill of the AI programmer, the algorithm would not be advanced enough to curate images based on the input of prompts. Thus, the AI program may also be able to show sufficient skill on the basis that the company provides the ability to create quasi-AI-generated art in the first place.

There is a large caveat to the discussion above regarding the potential employer-employee relationship between AI programs and users. That being the contractual obligations created by each AI platform's terms of use agreements. More often than not, this purported employer-employee relationship has been "contracted out of" by the AI program, meaning that the AI program has stipulated that it is not the "owner" of the images or output created

105. *What Is DALL-E and How Does It Work to Generate AI Images?*, UPWORK (May 13, 2024), https://www.upwork.com/resources/what-is-dall-e [https://perma.cc/2X3W-CKPR].

106. *See* George Hopkin, *Experts Say Humans Could Be Wrestling AI for Control by 2035*, AI MAG. (Mar. 1, 2023), https://aimagazine.com/articles/experts-say-humans-could-be-wrestling-ai-for-control-by-2035 [https://perma.cc/JMJ8-3DDF] ("[D]igital technology tools will increasingly become vital to people's decision-making process . . . this is a critical turning point that will determine the authority, autonomy, and agency of humans as digital technology spreads into more aspects of daily life.").

107. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

108. *DALL-E 3*, OPENAI, https://openai.com/index/dall-e-3/ [https://perma.cc/8SFD-Q6AY]; *Bing Image Generator,* BING, https://www.bing.com/images/create/ai-image-generator [https://perma.cc/XQZ8-ZCBQ].

109. *What Is AI Art? How It Works and How to Create It*, COURSERA (July 8, 2025), https://www.coursera.org/articles/what-is-ai-art [https://perma.cc/H6NR-4JB3].

by its program.[110] However, the possibility of the employer-employee construction between AI programs and users is not entirely impossible. Therefore, if the terms of use agreements change in a way that leaves the ownership of content in question, it could be possible to consider a user an employee of an AI program under the right circumstances, as discussed above.

2. The AI Program as the Employee

First, it must be established that the AI program is the agent of the user.[111] The user may assume the role of a principal in this relationship more easily. The user tells the AI program what to do, and the AI program then internalizes those prompts and creates an image based on those instructions.[112] Furthermore, after an initial image is created, the user may input more instructions to further guide the AI program to provide the desired result. The control that the user has over the AI program suggests that the user is the principal of the AI program.

The "skill required" factor from *Reid* is most important in discussing this hypothetical where the user is considered to be the employer in the user-AI relationship.[113] The strongest argument that the user exhibits more skill in creating the work is the quantity and quality of prompt writing that goes into the AI program. The more detailed and specific the user's prompts are, the more they demonstrate the user's skill—surpassing that of the AI, whose role is simply to follow the prompts and generate an image that matches the user's vision. Additionally, the more prompts submitted to the AI program after the work is initially generated is also indicative of the user's personal skill. The more the user tweaks an AI generated image, the more it appears that the user is in control of the final outcome of the work.

3. The User as an Independent Contractor

If a court determines that the *Reid* factors weigh in favor of considering the user as an independent contractor, then the work must fall into one of nine categories of works for the authorship and copyright to attach to the AI program. Additionally, there must also be an express written agreement stipulating that the work is a "work-made-for-hire."[114] The discussion of whether a quasi-AI-generated work falls into the specified categories will take place first. The nine categories are: (1) collective works, (2) motion picture or other audiovisual works, (3) translations, (4) supplementary works, (5) compilations, (6) instructional texts, (7) tests, (8) answer material for a test, and (9) atlases.[115]

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110. *Bing Image Creator and Bing Video Creator Terms of Use*, BING (May 2025), https://s.copilot.microsoft.com/new/termsofuseimagecreator?FORM=GENTOS [https://perma.cc/DH7P-MNM5]; *Terms of Service*, NIGHTCAFE (Nov. 26, 2025), https://nightcafe.studio/policies/terms-of-service [https://perma.cc/VT8X-BJR5]. The implications of the contractual problem have been discussed earlier in this Note. *See supra* Part II.d.

111. As established, an agent is subject to the control of the principal and acts on behalf of the principal. RESTATEMENT (SECOND) OF AGENCY § 1 (AM. L. INST. 1958).

112. *See* Joe Amditis, *A Beginner's Guide to Image Generation with DALL-E 3*, MEDIUM (Oct. 25, 2023), https://medium.com/centerforcooperativemedia/a-beginners-guide-to-image-generation-with-dall-e-3-4efd969ab8fb [https://perma.cc/M8LD-CRW5] (explaining the step-by-step process of image generation using DALL-E).

113. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989).

114. U.S. COPYRIGHT OFF., *supra* note 102, at 2.

115. *Id.*

Digital images do not obviously fall into any one of the nine categories. However, there is an argument to be made that quasi-AI-generated works classify into category five: compilations. Compilations are defined by 17 U.S.C. § 101 as follows: "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[116] Furthermore, the USCO has alluded to the fact that a work where a human has selected or arranged an AI-generated work in a "sufficiently creative way that 'the resulting work as a whole constitutes an original work of authorship,'" it may be designated as a compilation that includes AI-generated material.[117] It is important to highlight that even if a quasi-AI generated work is considered a "compilation" the USCO will refuse to recognize the computer generated material as protectable outside of the compilation that also includes human control.[118] However, despite the USCO's stance on granting protection to AI-generated material on its own, it is also important to remember that materials can still be rendered copyrightable without registration by the USCO. Therefore, the possibility for quasi-AI generated works to be considered "compilations" is still important to discuss because it establishes an essential element for the independent contractor analysis. If, as discussed above, courts find that quasi-AI-generated works classify as "compilations," there is one more hurdle to pass before an AI program will be able to claim the copyright in works created by its program.

That hurdle is the requirement of an express written agreement to create a "work-made-for-hire."[119] The various Terms of Use Agreements on different AI platforms (DALL-E, and Bing Image Generator), the agreements do not contain any express provisions made between the AI company and the user to create a "work-made-for-hire."[120] Therefore, even if AI-generated art is classified within a specified category of 17 U.S.C. § 101, the absence of a written express agreement will destroy the avenue to create an independent contractor/"work-made-for-hire" relationship between the user and the AI program.

For the sake of argument, if an express agreement between the user and the AI platform existed that stipulated that works created in the AI space are "works-made-for-hire," then it is likely the copyrightable material that has been created in that space will belong to the AI program. The work created by the AI system would need to belong to one of the nine categories of the "work-made-for-hire" doctrine as explained above, or an employer-employee relationship would need to be created.[121] If either of those requirements are met and a written agreement exists, an AI-generated work can be classified as a "work-made-for-hire." Conversely, if the agreement specifies that the work belongs to the AI system, the copyrightable material will belong to the AI company.

116. 17 U.S.C. § 101.

117. Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202).

118. *Id.* at 16192 n.33.

119. U.S. COPYRIGHT OFF., *supra* note 102, at 2.

120. *See supra* note 108 (highlighting DALL-E and Bing Image Generator terms of service).

121. U.S. COPYRIGHT OFF., *supra* note 102, at 2.

4. The AI Program and the User as Joint Authors

The Court in *Reid* alluded to the fact that it is possible for CCNV (a legal entity) to be a joint author of the sculpture created by the individual Reid, "if, on remand, the District Court determines that CCNV and Reid prepared the work 'with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.'"[122] The Court goes on to say that if that was the case, CCNV and Reid would be co-owners of the copyright in that particular work:[123]

> A joint work is a work that has been prepared by two or more authors. At the time of the joint work's creation, a joint work must have two or more authors, and:
>
> First, each author must have made a substantial and valuable contribution to the work;
>
> Second, each author must have intended that [his] [her] [*other pronoun*] contribution be merged into inseparable or interdependent parts of a unitary whole; and,
>
> Third, each author must have contributed material to the joint work which could have been independently copyrighted.[124]

Furthermore, absent an express intent to merge contributions, one may consider whether:

> (a) [B]oth . . . parties exercised control over the work;
>
> (b) [B]oth . . . parties' actions showed they shared the intent to be co-authors when creating the work . . .; and
>
> (c) the audience appeal of the work depends on the contribution of each party's so that the share of each party's contribution cannot be appraised.[125]

The above requirements of a joint work will now be applied to a hypothetical situation where a user and an AI program have generated an image (that satisfies all other requirements of a copyrightable work and also bypassing the "human authorship requirement").

First, both the AI program and the user must have substantially contributed to the work. The contribution made by the AI program is the process the algorithm goes through in analyzing the prompt it has been given, accessing its database of available existing artworks, and then creating a new piece of art. The user's contribution is slightly more contingent on the amount of work a particular individual puts into the program. For example, a user who puts in one prompt and does not attempt to specialize the image more could be seen as not "substantially contributing to the work." On the other hand, carefully crafting prompts and "tweaking" the image after the initial work has been produced by the AI program could be seen as "substantially contributing to the work." Users who provide detailed

122. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 753 (1989); *see also* 17 U.S.C. § 101.

123. *Reid*, 490 U.S. at 753.

124. *17.9 Copyright Interests—Joint Authors (17 U.S.C. §§ 101, 201(a))*, U.S. CTS. FOR 9TH CIR. (2025), https://www.ce9.uscourts.gov/jury-instructions/node/265 [https://perma.cc/8PB5-2MYF].

125. *Id.*

and thoughtful prompts to get the exact type of image they are looking for are more likely to be construed as adding significant artistic expression to the end product. Therefore, given the circumstances, users can be considered to have "substantially contributed to the work."

Second, intent must be shown by circumstances other than an express intent to become co-authors. This is because the most popular AI image creation software's (DALL-E, Bing, etc.) do not stipulate, as of yet, that the user and AI generator will be co-authors.[126] However, the intent element may be satisfied by the AI program's generation of artwork based upon, and in combination with, the user's prompting of the system. Both parties exercising control over the work may indicate the requisite intent to become co-authors of the generated work.[127] For instance, the AI program exercises control over the production of a given work by accessing its database full of pre-existing artworks and then using that knowledge to produce a new work based on the user's prompt. The user contributes the thought process of creating a given prompt (idea) and then fixes that thought in the form of a tangible sentence (an expression) that thereby prompts the creation of a new image.

However, it is important to note that copyright law does not recognize thoughts alone as copyrightable material.[128] The idea/expression dichotomy in copyright law does not recognize ideas as copyrightable because ideas themselves are not yet fixed in a tangible medium.[129] Each author must have intended for their contributions to be "merged into inseparable or interdependent parts of a unitary whole."[130] In quasi-AI-generated works, there is a clear interdependent component of the art created. Without the user's prompt, the specific artwork would not have been generated, and without the AI program's algorithm, the user would have been left with a sentence prompt of an expressed idea for the creation of an artwork. Another way to show intent to become co-authors is based on the "audience appeal" of the work.[131] The "audience appeal of the work depends on the contributions of each party so that the share of each party's contribution to the work's success cannot be appraised."[132] In other words, the audience appeal of a quasi-AI-generated work would reflect that the contributions by both the user and the AI program are unique, and neither would produce the end product without the other. The user's expressive prompt creation and the AI program's generation of a digital image are both essential to the creation of the work and to the audience appeal of the work.

Third, the contribution by the AI program and the user must independently have the ability to be copyrightable. This is the most difficult aspect of joint authorship to satisfy,

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126. *See* OPENAI, *supra* note 78 (explaining that as between the user and OpenAI, the user owns the "right, title, and interest, if any," in the output created from DALL-E); BING, *supra* note 110 (claiming that "Microsoft does not claim ownership" of any prompts you input or the images ["creations"] that are created by the AI program).

127. *17.9 Copyright Interests—Joint Authors (17 U.S.C. §§ 101, 201(a)),* U.S. CTS. FOR 9TH CIR. (2025), https://www.ce9.uscourts.gov/jury-instructions/node/265 [https://perma.cc/8PB5-2MYF].

128. *Copyright Basics*, UNIV. MICH. LIBR., https://guides.lib.umich.edu/copyrightbasics/copyrightability [https://perma.cc/WNP4-RQD9] ("The principle that copyright protects the expression of ideas but does not protect the ideas themselves is known as the 'idea/expression distinction.'").

129. *Five Things Copyright Law Does Not Protect*, INTEGRATED GEN. COUNS., P.C. (Feb. 10, 2019), https://integratedgeneralcounsel.com/five-things-copyright-law-not-protect/ [https://perma.cc/KC4T-AVCR].

130. 17 U.S.C. § 101 (defining "joint work").

131. *17.9 Copyright Interests—Joint Authors (17 U.S.C. §§ 101, 201(a)),* U.S. CTS. FOR 9TH CIR. (2025), https://www.ce9.uscourts.gov/jury-instructions/node/265 [https://perma.cc/8PB5-2MYF].

132. *Id.*

given the nature of quasi-AI-generated works and the different contributions made by the human user and the computer. To satisfy this component, both contributors have to satisfy the copyrightable subject matter requirement of 17 U.S.C. § 102. The contribution made by the AI program would fall under works fixed in a tangible medium of expression "with the aid of a machine or device"[133] that fall in the fifth category of accepted works, "pictorial, graphic . . . works."[134] To satisfy Section 102(b), the contribution by the AI program needs to be sufficiently distinguished from a "process" or "system" as those types of works are not recognized by copyright law.[135] The way to differentiate between the AI program's contribution from a "process" or "system" is to argue the AI program configures elements in a unique and original way to create a brand new digital graphic work. Although the AI program has a process and system for which it analyzes the user's prompt, the result it produces is a specific artwork that could be copyrightable. However, one could also argue the user's contribution falls under the first category of copyrightable works, "literary works."[136] Again, the user's prompts will need to possess original expression that goes beyond just an idea, concept, or principle, as such categories are not recognized by copyright law.[137] Therefore, the user's contribution must consist of prompting that is sufficiently original, and possesses a "modicum of creativity," rather than simply an assortment of random words. If the user has created a sufficiently creative expression, and that expression has been fixed in a tangible medium into the AI program, they will have contributed copyrightable material to the joint work.

Thus, there are multiple ways to vest copyright protection in quasi-AI-generated works. First, the AI program may be eligible for copyright protection over works created on its platform based on the "work-made-for-hire" doctrine. Second, there is the possibility that AI-generated artworks could share joint authorship between the user and the AI program. Although the current opinion of the USCO and the courts is that copyright protection will not vest in works created by non-human authors, there is always the possibility that the United States may adopt or change its laws to account for such artworks.[138] For example, it is possible that Congress changes or creates a law like the CDPA.[139] The potential for such a change in the United States will be discussed in the recommendation section.

IV. RECOMMENDATION

Given the various possibilities discussed above regarding the potential for AI systems to have some or all copyright protection in the works created by their program, this Note recommends the following. First, the United States should adopt legislation similar to the CDPA. Second, modifications from the baseline structure of the CDPA need to be made to

133. 17 U.S.C. §102(a).

134. UNIV. MICH. LIBR., *supra* note 128.

135. *See id.* (explaining that U.S. copyright law does not protect "any idea, procedure, process, system. Method of operation, concept, principle, or discovery"); 17 U.S.C. § 102(b).

136. 17 U.S.C. § 102(a)(1).

137. *What Does Copyright Protect?*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/faq-protect.html [https://perma.cc/2Y9C-JBSX].

138. ZIRPOLI, *supra* note 32, at 5.

139. *Artificial Intelligence Call for Views: Copyright and Related Rights*, U.K. INTELL. PROP. OFF. (Mar. 23, 2021), https://www.gov.uk/government/consultations/artificial-intelligence-and-intellectual-property-call-for-views/artificial-intelligence-call-for-views-copyright-and-related-rights [https://perma.cc/S4DN-TG7A].

clarify the boundaries of copyright protection for quasi-AI-generated art. The ultimate goal of this recommendation is to provide a solution for what to do with quasi-AI-generated artworks that meet the threshold requirements of copyrightable subject matter.

a. The United States Creation of a Quasi-AI Generated Works Law

The U.K. takes a unique approach to work that a computer has generated. The CDPA, adopted in 1988, "enables copyright protection in works generated by a computer in circumstances when there is no human author of the work."[140] Section 178 of the CDPA defines "computer generated" works as ones that are "generated by a computer in circumstances where there is no human author of the work."[141] Furthermore, the "author" of a computer-generated work is "the person who made the necessary arrangements to create the work," and those works are "protected for 50 years from the end of the calendar year in which they were created."[142] The U.K. is the first to award computer-generated works copyright protection, and "has been described as being at the forefront of innovation-protection of creative works."[143] By granting copyright protection in computer-generated works, the U.K. recognizes there is some value in the labor a human user puts into an AI system to achieve a certain output in the form of artwork.

In the United States, a key value of intellectual property rights rests on the labor theoretical framework.[144] The Lockean labor theory provides that if a person invests "time, money, knowledge and other resources in creating intellectual property" they should receive the ownership rights over it because of the labor they have invested into their creative expression.[145] Supporters of the U.K. approach in granting computer-generated works copyright protection argue that "the directive and curatorial instructions they use to guide AI tools require[] skilled labour and judgment that is worthy of recognition and protection."[146] Thus, based on the premise that quasi-AI generated works require some labor by the human user who is entering prompts, this Note recommends that the United States create a law similar to that of the CDPA to grant copyright protection for such works.

It is also noteworthy to highlight the USCO's position on quasi-AI-generated content. The USCO has stated that, "[a]lthough we believe the law is clear that copyright protection in the United States is limited to works of human authorship, questions remain about where and how to draw the line between human creation and AI-generated content."[147] The USCO considered a circumstance where a user of an AI system asserted sufficient control over the technology, such as selecting training materials and multiple iterations of prompts

140. Erickson, *supra* note 62.

141. Carlton Daniel, *Copyright Protection for AI Works: UK vs US*, SQUIRE PATTON BOGGS (July 12, 2023), https://www.iptechblog.com/2023/07/copyright-protection-for-ai-works-uk-vs-us/ [https://perma.cc/94K4-QK2S].

142. *Id.*

143. *Id.*

144. Janhavi KM, *Theories of Intellectual Property Rights*, IP MATTERS (Jan. 19, 2021), https://www.theipmatters.com/post/theories-of-intellectual-property-rights [https://perma.cc/ZK7Z-XZWK].

145. *Id.*

146. Erickson, *supra* note 62.

147. Artificial Intelligence and Copyright, 88 Fed. Reg. 59942, 59945 (Aug. 30, 2023) (internal citations omitted).

to result in output that could be human-authored.[148] The USCO is not opposed to the idea that human labor channeled into an AI system to produce a copyrightable work could potentially be protected by copyright law.[149]

Recently, the USCO has proposed that the analysis of whether a work created with the use of AI should be considered a work of human authorship "requires fact-specific considerations of the work and the circumstances of its creation."[150] The USCO copied this analysis from the early development of computer technology in 1965, and the case-by-case analysis used for works created with the assistance of computer technology to the newly developed arena of AI created artwork.[151] The USCO takes the following positions: "[w]here AI merely assists an author in the creative process, its use does not change the copyrightability of the output" and in contrast where "content is entirely generated by AI, it cannot be protected by copyright."[152] Moreover, the USCO has concluded that prompts entered into an AI system will not be enough to provide sufficient human control to make users of an AI system the authors of the output, and that multiple prompts entered into the system does not change this conclusion.[153] The USCO does suggest that there may be a time in the future when prompts may sufficiently control the expressive nature of an AI output, but does not clarify the kinds of prompts that would suffice in such a future.[154] As a final point, the USCO expressly states that there is no need to change the law because statutory language would not be able to create brighter lines in the area of AI art and that legislation will not provide greater clarity.[155]

This Note disagrees with the USCO conclusion that a change in the law is inadequate to solve the quasi-AI-generated art issue. The clarity given by the USCO with regard to quasi-AI-generated art is to analyze cases on a case-by-case basis to determine whether there is "sufficient human control." Absent any case law discussing what kinds of actions taken by a user constitute "sufficient human control" and without statutory language defining "sufficient human control," there is no way to discern what kinds of AI-generated output is copyrightable. Thus, the uncertainty of when it is appropriate to allocate copyright protection to certain quasi-AI-generated works leaves room to advocate for a law similar to the CDPA.

b. The Necessary Modifications

The CDPA fails to make it clear whether the "human stand-in author" must meet the originality requirement for copyright to apply in traditional works and is therefore uncertain about whether prompts need to be sufficiently original to grant protection in the output of AI-generated artwork.[156] The following solution is suggested to account for this ambiguity.

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148. *Id.*
149. U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 2 COPYRIGHTABILITY 2 (2025).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 18–20.
154. U.S. COPYRIGHT OFF., *supra* note 149, at 21.
155. *Id.* at 40.
156. Erickson, *supra* note 62.

1. Sufficient Human Control

First, this Note recommends that adopting a law to govern quasi-AI generated artworks requires a determination of how much effort a user has contributed into an AI system to produce the end result. The overarching theme of this requirement is "sufficient human control." To determine whether a quasi-AI generated artwork has "sufficient human control," the following questions should be asked: (1) how many prompts has a user entered into the AI system before reaching the end result?, and (2) did the user make any modifications to the material originally generated by the AI system?[157] The above questions are drawn from the USCO's process for applying the human authorship requirement, and it suggests that works containing AI-generated material can also have sufficient human authorship to support a copyright claim. The USCO goes on to state that, in such cases, copyright protection will only extend to "the human-authored aspects of the work, which are 'independent of' and do 'not affect' the copyright status of the AI-generated material itself."[158] Despite this assertion made by the USCO, this Note maintains the recommendation that a "sufficient human control" approach should be taken in considering the production of artworks created with AI systems. The USCO has stated that AI-generated artwork may be copyrightable given that there is sufficient human contribution in the output.[159] However, the USCO does not provide any guidance as to what can be considered "sufficient human control" and instead insists that review on a case-by-case basis is the best practice.[160]

This recommendation mirrors the USCO approach in that "sufficient human control" is a part of its analysis of quasi-AI generated artwork, however; this recommendation takes the position that legislation is the best solution to guide the "sufficient human control" inquiry. The "sufficient human control" inquiry should be codified in legislation in the form of a factored approach or a line of questioning to best account for instances where quasi-AI generated art presents itself. In all, works that provide "sufficient human control" should be granted copyright protection. Although the user is entering prompts and modifying the image through text, rather than creating an image in the traditional manner, there should be a copyright protection extended to those works which exhibit a high amount of human user control and satisfy the originality and subject matter requirements of copyrightable material.

2. Leave the Rest to the Public

Second, this Note recommends a provision to govern situations where it has been determined that the AI system puts in more work than the human author. In circumstances where "sufficient human control" is not satisfied, and all the other requirements of a copyrightable material have been satisfied, such works should remain in the public domain. The first reason for this recommendation is the stance the United States presently takes on non-human authors. Since the United States does not recognize non-human authors for purposes of copyright protection, leaving works that fail the "sufficient human control"

157. U.S. COPYRIGHT OFF., COPYRIGHT REGISTRATION GUIDANCE: WORKS CONTAINING MATERIAL GENERATED BY ARTIFICIAL INTELLIGENCE 4 (2023).

158. *Id.*

159. *Id.* at 2.

160. *Id.* at 3–4.

standard in the public domain is the most consistent with prior case law concerning human authorship. Second, restricting copyright protection of quasi-AI-generated works to those that do have sufficient human control is essential. This will prevent the voluminous proliferation of AI-generated outputs from a singular non-original prompt.[161] Some have already argued that the benefit of placing AI-generated outputs in the public domain is that there is just so much AI content in today's society.[162] This Note argues that placing the content that fails the sufficient human control component into the public domain is the best solution because it keeps those works out of the copyright protection realm that lack actual human labor and components of artistry and personality that may only be created through sufficient human control.

V. CONCLUSION

In all, this Note recommends that the United States create a law that governs quasi-AI-generated works. While the CDPA provides a vague grant of protection to computer generated works where a human author has had control over the necessary arrangements of the work, the United States should take a more specific approach. To determine whether there has been "sufficient human control" in a given work, use factors such as the number of prompts a user enters into the program and the quality and quantity of modifications made to the original output. Using these factors is essential to determining whether such a work should be granted copyright protection. The works that fail this requirement should remain in the public domain, as this is consistent with the USCO and the court's opinion on human authorship and is the best way to prevent an overflow of copyright protection to works that are not truly deserving of it.

161. Erickson, *supra* note 62.
162. *See id.* (arguing AI content should be public domain).