



HUMANIST COPYRIGHT

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This exploration of the role of authorship in copyright law proceeds in three parts: historical, doctrinal, and predictive. First, I will review the development of author-focused property rights in the pre-copyright regimes of printing privileges and in early Anglo-American copyright law through the 1909 U.S. Copyright Act. Second, I will analyze the extent to which the present U.S. copyright law does (and does not) honor human authorship. Finally, I will consider the potential responses of copyright law to the claims of proprietary rights in AI-generated outputs. I will explain why the humanist orientation of U.S. copyright law validates the position of the Copyright Office and the courts that the output of an AI system will not be a “work of authorship” unless human participation has determinatively caused the creation of the output.

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INTRODUCTION

Much American copyright rhetoric vaunts technological progress and economic incentives. One reading of the constitutional copyright clause characterizes copyright as a necessary (if unappealing) encouragement to the advancement of

innovation.¹ These emphases tend to obscure the centrality of human creativity to copyright law and theory.

In this article, provocatively titled “Humanist Copyright,” I develop a counter-narrative. I seek to highlight the role of human authorship in the copyright scheme. The title references not only current debates over AI-generated outputs but also the proposition that authors’ rights embody and advance human achievement. Copyright celebrates human creativity, for multiple reasons, economic and social, but also grounded in the person of the author. I trace these concepts to Italian Renaissance humanism and the emergence of the author as entrepreneur.

My exploration of the role of authorship proceeds in three parts: historical, doctrinal, and predictive. First, I will review the development of author-focused property rights in the pre-copyright regimes of printing privileges and early Anglo-American copyright law through the 1909 U.S. Copyright Act.² Second, I will analyze the extent to which the present U.S. copyright law does (and does not) honor human authorship. Finally, I will consider the potential responses of copyright law to the claims of proprietary rights in AI-generated outputs. I will explain why the humanist orientation of U.S. copyright law validates the position of the Copyright Office and the courts that the output of an AI system will not be a “work of authorship” unless human participation has determinatively caused the creation of the output.

The phrase “humanist copyright” nods to Italian Renaissance philosophers such as Giovanni Pico della Mirandola, whose 1485 *Oration on the Dignity of Man* emphasized human autonomy in a human-centered universe.³ Pico declared that “we have been born into this condition of being what we choose to be”; man stands

¹ See, e.g., Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); Michael Abramowicz, *A New Uneasy Case for Copyright*, 79 GEO. WASH. L. REV. 1644 (2011); Oren Bracha & Talha Syed, *Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited*, 92 TEX. L. REV. 1841 (2014).

² For a fuller account of authorship-centered bases for early U.S. copyright, see OREN BRACHA, *The Rise and Fall of Authorship-Based Copyright*, in OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY 1790–1909, at 54–123 (2016).

³ GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF MAN 7, 11–12 (A. Robert Caponigri trans., Regnery Publishing 1956) (1496). See also Daniel J. Gervais, *The Machine as Author*, 105 IOWA L. REV. 2053, 2073–75 (2020).

“at the very center of the world . . . as the free and proud shaper of [his] own being, to fashion [him]self in the form [he] may prefer.” While Pico emphasized self-determination in shaping individual lives, the kinship between the authorship of one’s being and the authorship of works of art and literature is apparent. Concepts of creative autonomy took root and flowered in 16th-century Italy, as Giorgio Vasari’s *Lives of the Artists* attests.⁴ My counter-account of copyright thus begins in 16th-century Rome and focuses on one protagonist in the development of authorial rights.

I. HISTORY

A. *Printing Privileges: Authors as Entrepreneurs—Antonio Tempesta*

The typical account of the pre-copyright world of printing privileges, particularly in Venice, France, and England, portrays a system primarily designed to promote investment in the material and labor of producing and disseminating books; protecting or rewarding authorship was, in this version of the story, at most an ancillary objective. As the former Register of Copyrights Barbara Ringer put it, “The author was the forgotten figure in th[e] drama [of the origins of copyright], which was played out during the 16th and 17th centuries in England, France and other Western European countries”⁵

More recent scholarship, however, reveals that, at least in 16th-century Rome and Venice, an author’s role in obtaining and exploiting printing privileges that conferred exclusive rights to print and sell his work was more prominent than previously believed.⁶ Notably, with respect to documents found in the Vatican Archives, the majority of 16th-century privileges issued by the Papacy were awarded to authors, and even where a printer received a privilege for a work of a living author, the petition increasingly asserted the author’s endorsement of the application. The predominance of authors suggests that their personal creativity afforded a

⁴ GIORGIO VASARI, *Life of Michelangelo Buonarroti*, in 1 LIVES OF THE ARTISTS 327 (George Bull trans., Penguin Books 1987) (1550).

⁵ BARBARA A. RINGER, THE DEMONOLOGY OF COPYRIGHT 7–8 (1974).

⁶ See Jane C. Ginsburg, *Proto-Property in Literary and Artistic Works: Sixteenth-Century Papal Printing Privileges*, 36 COLUM. J.L. & ARTS 345 (2013); see also ERIKA SQUASSINA, PRIVILEGI LIBRARI ED EDIZIONI PRIVILEGIATE NELLA REPUBBLICA DI VENEZIA (1527–1565) (2022).

ground for bestowing exclusive rights over the printing of initial and variant versions, as well as in the sale and importation of their works. Let us consider one of these authors: the painter and printmaker Antonio Tempesta.

In the late 1580s, Florentine painter and printmaker Antonio Tempesta (1555–1630), whose commissions to fresco churches and private residences had fallen off with the demise of his papal patron Gregory XIII, perceived new opportunities in the burgeoning print market. Printed images of Rome proved increasingly popular with pilgrims (effectively, tourists), particularly in anticipation of the Jubilee of 1600.

Moreover, Rome's urban transformation under Gregory XIII's successor, Sixtus V, refocused attention from the ruined glories of the imperial past to the grandiose design of new thoroughfares, piazzas, fountains, and edifices. The newly-mastered engineering feat of transporting obelisks symbolized the passage of grandeur from Roman emperors to Popes—obelisks displaced from their pagan settings now rose throughout the city, facing churches and ecclesiastical palaces. An immense bird's-eye view depiction of the city, greater in size and detail than any predecessor, would celebrate the new Rome, and would advertise Tempesta's representational accomplishments to prospective Papal patrons and other benefactors. It would also enhance his reputation as a printmaker.

Tempesta anticipated great success for his map. Accordingly, he sought to ensure that he would retain the profits. He not only drew the underlying images and etched them himself but also kept the plates rather than selling them to one of the established Italian or Flemish print publishers in Rome. In a step then unusual for artists and print designers, he thus became his own publisher.

Most importantly from an intellectual property perspective, he obtained a Papal privilege granting him a ten-year monopoly on printing or selling his map. Tempesta was by no means the first mapmaker or printmaker of Roman images to seek exclusive rights from the Pope and other sovereigns. But Tempesta's Papal privilege stands out for the arguments he made to support his application for the grant. Tempesta wrote:

Antonio Tempesta, Florentine painter, having in this city [Rome] printed a work of a new Rome, of which he is not only the creator, but also has drawn and engraved it with his own hand, with much personal expense, effort, and care for many years, and fearing that others may usurp this work from him by copying it, and consequently gather the fruits of his efforts, therefore approaches Your Holiness and humbly re-

quests him to deign to grant him a special privilege as is usually granted to every creator of new works, so that no one in the Papal States may for ten years print, have printed, or have others make the said work, and [further requests] that all other works that the Petitioner shall in the future create or publish with permission of the superiors [Papal censorship authorities] may enjoy the same Privilege as well so that he may with so much greater eagerness attend to and labor every day [to create] new things for the utility of all, and for his own honor, which he will receive by the singular grace from Your Holiness.⁷

The petition evokes justifications spanning the full range of modern intellectual property rhetoric, from fear of unscrupulous competitors to author-centric rationales. Invocations of labor and investment (“with much personal expense, effort, and care for many years”) and unfair-competition-based justifications (“fearing that others may usurp this work from him by copying it, and consequently gather the fruits of his efforts”) were familiar, indeed ubiquitous, in Tempesta’s time, and they still echo today.

From the earliest Roman printing privileges in the late 15th century, these rationales figured prominently in petitions by and privileges granted both to authors and to publishers. Petitions and privileges would frequently emphasize the public benefit that publishing the work would confer, while stressing that the author or publisher hesitates to bring the work forth lest others unfairly reap the fruits of their labors, to the great detriment of the author or publisher. Other petitions made explicit the incentive rationale that underlies investment-protection arguments.⁸ They urged, as did Tempesta, that the grant of a privilege would encourage not only immediate publication of the identified work but also future productivity, to even greater public benefit (“so that he may with so much greater eagerness attend to and labor every day [to create] new things for the utility of all”).

We can see that long before the 1710 Statute of Anne—the first act vesting exclusive rights in authors, and the event which is commonly accepted as the birth of the modern era of copyright—the precursor regime of printing privileges understood exclusive rights as incentives to intellectual and financial investment. The

⁷ Archivio Segreto Vaticano, Sec. Brev. Reg. 208 F. 74, F. 76r (Oct. 13, 1593) (translated by author). For fuller discussion of Tempesta’s petition and privilege, see *Petition from and Privilege Granted to Antonio Tempesta for a Map of Rome (1593)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (Lionel Bently & Martin Kretschmer eds.), <https://perma.cc/Z3WJ-89AJ>.

⁸ See Ginsburg, *supra* note 6, at 367–71.

pre-copyright system had thus already firmly established one of the philosophical pillars of modern copyright law.

Tempesta's petition, however, went further than its antecedents with respect to the second pillar of modern copyright law: that is, the justification based on the natural rights of the author, a rationale that roots exclusive authorial rights in personal creativity. Tempesta's contention that new works routinely receive privileges was not novel, but he focused on the rights of the creator ("as is usually granted to every creator of new works") and equated creativity with his personal honor. This argument foreshadowed the modern moral rights conception of copyright.

It would be anachronistic to argue that Tempesta claimed that exclusive rights inherently arise out of the creation of a work of authorship, rather than solely by sovereign grant—on the contrary, Tempesta carefully acknowledged both that privileges are a "singular grace" from the Pope, and that all works must receive a license from the Papal censors. Nonetheless, in advancing the then-unusual request that the privilege cover "all other works that the Petitioner shall in the future create or publish," Tempesta was urging that his entire future production should automatically enjoy a ten-year monopoly on reproduction and distribution in the Papal States (a claim that was subject, of course, to the censors' approval of each work Tempesta would bring forth).

In more modern terms, Tempesta was seeking a result equivalent to "I created it; it's mine." Tempesta also tied his request to incentive rationales—a broad grant of rights would spur him ever more eagerly to greater creativity—and this conflation of creativity-based and labor-incentive conceptions anticipated the frequent oscillation and overlap in modern copyright between natural rights and social contract theories of copyright.

B. The Statute of Anne and the U.S. Constitution's Copyright Clause

1. Statute of Anne: Encouragement of learned men to write useful books

From 1556 to 1594, the English guild of printers, the Stationers Company, enjoyed a perpetual monopoly over published books by virtue of the Licensing Acts. When the last of these expired in 1594, publishers lobbied for a renewal of rights, which had become increasingly controversial, particularly to the extent that the Company had "a monopoly of all the classical authors," as John Locke lamented.⁹

⁹ JOHN LOCKE, *Locke's Memorandum*, in LOCKE: POLITICAL ESSAYS 330–37 (Mark Goldie ed., 1997) (1694) ("[I]t is very absurd and ridiculous that anyone now living should have a propriety in,

Contemporary authors also lobbied, seeking rights in their own name, as well as some assurance that they would share in the future success of their works once they had transferred their manuscripts to the printers.¹⁰

The 1710 Statute of Anne became the first law systematically to vest copyright in creators. Its title states its purpose to be “for the Encouragement of Learning,” a goal echoed in its first paragraph, which exhorts “the encouragement of learned men to compose and write useful books.” Parliament acknowledged that the damage done to authors and their families by unauthorized copying of their books threatened that objective. Vesting in authors an exclusive right of publication to last for 21 years for existing works and for 14 years for works published in the future, with an additional 14 years contingent on the author’s survival, would promote this purpose.

The Statute of Anne shifted the law’s emphasis toward authorship both by making authors the first owners of copyright and by conditioning the duration of exclusive rights on the life of the author. Moreover, Parliament responded to authors’ demands to provide an ongoing financial interest in their works by decreeing that at the end of the initial 14-year term, “the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.” In theory, the second fourteen years should have enabled the author to grant rights anew from a stronger bargaining position should the work have earned a substantial audience. The statute thus broke new ground when it not only gave the author the rights at the outset,¹¹ but also (providing he survived) “return[ed]” them to him for a second time.¹²

or a power to dispose of the propriety of any copy or writings of authors who lived before printing was known or used in Europe.”).

¹⁰ Statute of Anne 1710, 8 Ann., c. 19, § XI.

¹¹ See Gervais, *supra* note 3, at 2075–78 & n.117 (describing Catherine Seville’s characterization of the Statute of Anne’s referencing authors as “novel” (citing Catherine Seville, *The Emergence and Development of Intellectual Property Law in Western Europe*, in *THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW* 171, 180 (Rochelle C. Dreyfuss & Justine Pila eds., 2018))).

¹² For a fuller discussion of authors’ reversion rights in the Statute of Anne, see Lionel Bently & Jane C. Ginsburg, “*The Sole Right Shall Return to the Author*”: *Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 *BERKELEY TECH. L.J.* 1475, 1480–1541 (2011).

2. Pre-Constitution state copyright statutes and the constitutional Copyright Clause: Not just about incentives

The Statute of Anne and the copyright laws later adopted in the former Colonies set the stage for the Copyright and Patent Clause of the Constitution and for the 1790 enactment by the first Congress of the first federal statutes governing copyrights and patents. After the close of the Revolution, all of the Colonies except Delaware passed laws to afford a measure of protection to authors, pursuant to a recommendation of the Continental Congress¹³ and the entreaties of Noah Webster, who tirelessly (and self-interestedly) urged that protecting authors not only responded to the claims of natural justice but would also spawn the creation of the kinds of American-oriented school books, geographies and dictionaries essential to the development of the citizenry of the new republic.¹⁴ Webster thus coupled the cultural policy of the new nation with the recognition of authors' inherent rights in their works. Similarly, many states mingled natural-rights rhetoric with utilitarian rationales. For example, the preamble to the Massachusetts Copyright Act of 1783 proclaimed:

Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is procured by the labor of his mind.¹⁵

At the federal level, the United States followed England as the only nation at the time to design exclusive rights around the author. The Constitution's Copyright Clause empowers Congress "to promote the Progress of Science and Useful Arts by

¹³ 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 326 (1783).

¹⁴ NOAH WEBSTER, *Origin of the Copy-Right Laws in the United States*, in A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 173 (1843); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW 131, 138–39 (Brad Sherman & Alain Strowel eds., 1994).

¹⁵ *An Act for the Purpose of Securing to Authors the Exclusive Right and Benefit of Publishing Their Literary Productions, for Twenty-One Years*, THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 369–70 (1789), <https://perma.cc/UU6Q-KHCU> [hereinafter Massachusetts Copyright Act of 1783].

securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and discoveries.”¹⁶ It instructs Congress that exclusive rights would go to the creators of “Writings.” The clause’s further direction that the exclusive right be “for limited times,” in the plural, may also advert to the Statute of Anne’s conditional second term of copyright, thereby implicitly endorsing the author’s reversion right established by the English example.¹⁷

The Constitution’s Copyright Clause melds utilitarian and authorial property rationales. The goal of the property right is to enhance public knowledge, but the rights—though limited in time—are “secure[d],” not “granted,” by Congress. Admittedly, the Supreme Court in 1834 declined to read “secured” to advert to a concurrent common law property right regime, and held instead that rights in published works were a purely statutory creation.¹⁸ But in 1787, when the clause was drafted, the selection of the term “secured” may have meant that the Framers understood copyright to have been a natural right pre-existing at common law.¹⁹

Madison’s account of intellectual property in Federalist 43 supports this conclusion. As justification for the power granted to Congress to provide for copyright and patents, Madison asserts, “The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law.”²⁰ In addition, given state enactments of copyright laws whose efficacy stopped at each former colony’s borders, “securing” may advert both to reinforcing preexisting rights and to conferring a new nationally-enforceable right. As treatise writer George Ticknor Curtis explained in 1847,

¹⁶ U.S. CONST. art. I, § 8, cl. 8.

¹⁷ For a fuller discussion of authors’ reversion rights in U.S. copyright law before the 1976 Copyright Act, see Bently & Ginsburg, *supra* note 12, at 1549–64.

¹⁸ *Wheaton v. Peters*, 33 U.S. 591 (1834).

¹⁹ For a review of various meanings to ascribe to “securing,” see, e.g., Edward C. Walterscheid, *Inherent or Created Rights: Early Views on the Intellectual Property Clause*, 15 *HAMLIN L. REV.* 81, 92–98 (1995) (reasoning, among other things, that the Preamble to the U.S. Constitution states that one of the purposes of the constitution is to “secure the blessings of liberty to ourselves and our posterity”; the Constitution didn’t grant liberty—the war of Independence did that—but it was designed to protect and reinforce it). See also EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 210–12 (2002).

²⁰ THE FEDERALIST NO. 43 (James Madison). *But see* Walterscheid, *supra* note 19, at 98 (concluding from Madison’s additional remark about inventors that Madison “clearly contemplated and used [securing] to mean ‘to obtain’ or ‘to provide’”).

[T]he rights of authors in their published works existed by statute, in some of the states, before the constitution of the United States was formed; and there cannot be much doubt that they also existed, in the older states, at common law. What, then, were the rights of authors, to be “secured,” under the power granted to the national legislature? The object to be gained by this grant of power will aid in determining the meaning of the language employed. The object clearly was to enable the general government to make laws which should secure the proceeds of a book in all the states to an author residing and publishing in any one of the states. The old congress had this object in view, when they recommended to the states to pass laws for this purpose; and it was distinctly urged, by the advocates for the adoption of the federal constitution, as the main reason for the provision.²¹

The Constitution’s copyright clause, at least in part, supports an author-centrist view of U.S. copyright, and, as perhaps forecast in the Constitution, the nation’s first copyright act in 1790 adopted the Statute of Anne’s two-tiered duration scheme, with a second term of 14 years contingent on the author’s survival and a reversion of rights to the author.²² Nineteenth- and early 20th-century U.S. courts perceived the reversion right consistently with the labor-deserts and fairness rationales advanced from the outset of Anglo-American copyright. Thus, one appellate court observed: “There are at least sentimental reasons for believing that Congress may have intended that the author, who according to tradition receives but little for his work, and afterwards sees large profits made out of it by publishers, should later in life be brought into his kingdom.”²³ Similarly, a circuit court in 1846 declared: “It was the genius which conceived and the toil which compiled the book that is to be rewarded by even the first copyright, and no one ever dreamed that an assignee could alone take out the second or extended term, unless he has paid for it, clearly contracted for it”²⁴

²¹ GEORGE TICKNOR CURTIS, *A TREATISE ON THE LAW OF COPYRIGHT* 81 (1847); *see also* THE FEDERALIST NO. 43 (James Madison) (“The states cannot separately make effectual provision for either of the cases (or copyright or patent) . . .”).

²² Early U.S. caselaw recognized the second term of copyright as a “new interest” that was “made to benefit authors.” *Pierpont v. Fowle*, 19 F. Cas. 652, 659–60 (C.C.D. Mass. 1846) (No. 11,152).

²³ *White-Smith Music Publ’g Co. v. Goff*, 187 F. 247, 251 (1st Cir. 1911).

²⁴ *Pierpont*, 19 F. Cas. at 659–60.

The last part of the court's solicitude for authorship, however, introduces an ominous qualification. Authors enjoy reversion rights unless they "clearly contract" them away to the initial assignee. Given authors' weaker bargaining position, it is no surprise that the publishing form contracts that appear to have become standard by the 1870s systematically provided for the alienation of the first term and of the renewal terms, without any separate consideration for the latter.²⁵

The assignability of the renewal term would seem to undermine its purpose of affording authors improved opportunities for remuneration, but the Supreme Court, in a 1943 controversy involving the song "When Irish Eyes Are Smiling," ultimately ruled that the author's first-term assignment of the second term bound him to convey the renewal term to the original publisher.²⁶ Justice Frankfurter, finding no explicit statutory limitation on the author's advance assignment of the renewal term, showed no solicitude for the plight of the author, finding no reason, whether "sentimental" or practical, for constraining the author's freedom to contract away his renewal rights.²⁷

²⁵ See, e.g., Contract between Julia Magruder and Harper & Bros. (1899) (on file with Harper & Brothers [Publishers] Records 1817–1929, Columbia University Rare Book and Manuscript Library [hereinafter Harper & Bros. (Columbia)]) (for *A Manifest Destiny*). Earlier handwritten contracts did not explicitly convey rights to the renewal term, but would grant the right to publish "during the terms of copyright." See, e.g., Contract between Mary A. Dodge and Harper & Bros. (1871) (on file with Harper & Bros. (Columbia)) (for *School-House Stories*) (emphasis added). Other publishers' form contracts contained similar language. See, e.g., Contract between Frances Hodgson Burnett and Charles Scribner & Sons (Dec. 3, 1895) (on file with Atkins Archive, Columbia University Rare Book and Manuscript Library [hereinafter Atkins (Columbia)]) (for *A Lady of Quality*) ("exclusive right to publish said work during the terms of copyright and renewals thereof"); Contract between Frances Hodgson Burnett and Charles Scribner & Sons (June 14, 1897) (on file with Atkins (Columbia)) (for *Duke of Osmonde*) (containing the same granting language); Contract between Frances Hodgson Burnett and Holiday Publishing Co. (Sept. 7, 1900) (on file with Atkins (Columbia)) (for *The Land of the Blue Flower*) ("during the full terms of copyright of the same and all renewals thereof").

²⁶ *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

²⁷ See *id.* at 656–57 (mischaracterizing the reversion right as merely a guarantee against improvident transfers): "We are asked to recognize that authors are congenitally irresponsible, that frequently they are so sorely pressed for funds that they are willing to sell their work for a mere pittance, and therefore assignments made by them should not be upheld. . . . We cannot draw a principle of law from the familiar stories of garret-poverty of some men of literary genius. . . . We do not have such assured knowledge about authorship . . . or the psychology of gifted writers and composers, as to justify us as judges in importing into Congressional legislation a denial to authors

3. Counter-evidence: Formalities and *Wheaton v. Peters*' extreme positivism

In its first implementation of its power to enact copyright laws, Congress conditioned the availability of exclusive rights on compliance with burdensome formalities. The first statutes, enacted in 1790 for maps, charts and books,²⁸ and in 1802 for prints and engravings,²⁹ were heavily inspired by (not to say largely plagiarized from) the Statute of Anne and the 1735 Hogarth's Act protecting original prints and engravings. But where the English statutes and their early judicial interpretations confined formalities to specific statutory remedies,³⁰ the U.S. statutes subjected the existence and enforceability of the right on compliance with the registration and deposit formalities.³¹

If there was any ambiguity regarding the availability of general common law remedies for violations of the 1790 Act in the absence of compliance with formalities, the 1802 Act, which added the notice formality, left no doubt that the work would never attain federal protection if the formalities went unfulfilled.³² Formalities proved so essential to U.S. copyright that one federal court, endeavoring in 1829 to determine whether a "daily price quote" could qualify for copyright, concluded that ephemera of this kind, whose utility and value vanish after a day, could not be copyrightable subject matter within the statute because it made no sense to comply

of the freedom to dispose of their property possessed by others. While authors may have habits making for intermittent want, they may have no less a spirit of independence which would resent treatment of them as wards under guardianship of the law." *See also* *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 375 (1960) (characterizing the second term as a contingent interest vested in heirs if the author did not survive into the renewal term).

²⁸ Copyright Act of 1790, ch. 15, §§ 3–4, 1 Stat. 124, 125.

²⁹ Copyright Act of 1802, ch. 36, § 1, 2 Stat. 171, 171.

³⁰ *See* discussion *infra* text at note 45.

³¹ The 1790 Act required deposit of the work with the clerk of the federal district court upon publication of the work (section 3), and deposit of 3 copies with the Secretary of State within 6 months of publication (section 4). The 1802 Act further required a notice of copyright in at least one newspaper within one month of publication (section 1).

³² Justice Bushrod Washington so held in *Ewer v. Coxe*, 8 F. Cas. 917 (C.C.E.D. Pa. 1824) (No. 4,584). *Accord* *Nichols v. Ruggles*, 3 Day 145 (Conn. 1808). *But see* *King v. Force*, 14 F. Cas. 521 (C.C.D.D.C. 1820) (No. 7,791) (suggesting the plaintiff could cure the omission of the date from his map by republishing the map with the date).

with formalities directing the proprietor to publish a record of the work's publication for four weeks in one or more newspapers and to deposit the work within six months of publication.³³

One might view a formalities-freighted copyright regime as fundamentally antithetical to an authors' rights concept of copyright. Rather than "securing" a natural entitlement, copyright would merely be a conditional government grant.

For example, requiring the author to affix a notice of copyright, or to register and deposit copies of the work with a government agency before the right will be recognized or enforced, is fully consistent with a social contract view of copyright. Imposition of formalities thus would reflect the premise that creating the work does not alone justify protection: Copyright is a *quid pro quo*, and it is the author's burden to assert her rights properly; should she fail to keep her end of the bargain, the

³³ Clayton v. Stone, 5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2,872). Republican fears of monopolies may have motivated the institutional and judicial requirement of strict observance of statutory formalities. See, e.g., L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article 1, Section 8, Clause 8 of the Constitution*, 52 EMORY L.J. 909, 941 (2003). On intellectual property and early American monopoly-phobia, see, e.g., Lewis Hyde, *Frames from the Framers: How America's Revolutionaries Imagined Intellectual Property* 13–29 (Berkman Ctr. Rsch., Research Publication No. 2005-08, 2005); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1169; Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 570 (2000) (the Founders understood copyright as a monopoly to be "carefully circumscribed"). But see Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 GREEN BAG 2D 37, 45 (2002) (arguing that modern scholars' attribution of anti-monopoly animus to the framing of early U.S. copyright laws is overstated); Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 55–56 (1994) (noting the few voices raised against giving Congress the power to grant monopolies, but concluding that, "Just as in the Constitutional Convention itself, the issue of the limited monopolies authorized by the Intellectual Property Clause seems never to have been a point of contention in the state ratifying conventions. Although it was generally received with favor by those who thought about it, with Jefferson being the notable exception, the reality is that among the much more momentous issues addressed with respect to the new Constitution, very few actually gave much thought to it."); Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2364, 2384–85 (2003) (originalist arguments do not withstand careful examination, which reveals a spectrum of attitudes including support for monopolies among the Federalists and—in a limited manner—from the future Republicans).

innocent public should not be liable for unauthorized exploitations. Formalities thus make free copying the default position; that initial stance should not vary unless the author undertakes to warn the world of her claims.

So characterized, formalities clash with a theory of copyright as springing from the creative act. If copyright is a natural property right in the fruits of the author's intellectual labor, then copyright is born with the work, and no further action should be necessary to confer or confirm the right. Hence, in theory, a natural property rights conception of copyright should eschew formalities.³⁴

Such tidy coherence may be theoretically satisfying, but it is also substantially anachronistic. In historical context, the opposition of natural rights and state monopoly concepts was much less sharp. By the same token, the role of formalities as exemplifying one or another concept of copyright law reflects subsequent rationalizations more than contemporary experience.

Neither at the beginning of the 18th century, with the Statute of Anne, nor towards its end, with the U.S. Constitution's copyright clause or the first U.S. copyright statute, did lawmakers set out to conceptualize copyright exclusively as a natural right or only as a conditional state grant, or for that matter to adopt any overriding theory of copyright. In the case of the Statute of Anne, the vesting of rights in authors rewarded their intellectual labor,³⁵ and the conditioning of an additional term of protection on the author's remaining alive³⁶ further demonstrates the Act's

³⁴ Benjamin Kaplan, *Study No. 17: The Registration of Copyright*, in 1 STUDIES ON COPYRIGHT 325, 366 (Arthur Fisher mem. ed. 1963) ("Those for whom copyright is a 'natural' right have regarded formalities as repugnant to such a right and therefore offensive in their nature; while those who think of copyright as a State-granted, limited 'monopoly' have tended to look upon formalities as somehow the proper or even the necessary accompaniment of the grant."); SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY §§ 3.25–3.26 (2008). See also *Valancourt Books v. Garland*, 82 F.4th 1222, 1229 (D.C. Cir. 2023) (rejecting district court's characterization of the mandatory deposit formality copyright as a "condition on the receipt of the governmental benefit of copyright protection"; rather, copyright "subsists," as it is "instant and automatic" upon creation and fixation).

³⁵ Laura Moscati, *Un "Memorandum" di John Locke tra Censorship e Copyright*, LXXVI RIVISTA DI STORIA DEL DIRITTO ITALIANO 69 (2003), has demonstrated a link between Locke's general theory of property rights, and his expression of literary property rights, subsequently captured in the Statute of Anne.

³⁶ The last sentence of the Statute of Anne (section 11) states: "Provided always that after the expiration of the said term of fourteen years the sole right of printing or disposing of copies shall

focus on the rights of authorship, but the statute also adopted the regulatory framework, including registration with the Stationers Company and deposit of copies of books with designated libraries, established under the 1662 Licensing Act.³⁷ Arguably, Parliament retained the bureaucratic aspects of the pre-copyright printing privileges not because its Members carefully conceptualized the nature of copyright, but because the prior system was known and had worked.³⁸ In the case of the early U.S. enactments, many of the pre-Constitution state copyright statutes referenced earlier included preambles with ringing declarations of natural property rights,³⁹ but then copied the Statute of Anne almost verbatim, including its requirements of registration and deposit of copies.⁴⁰

return to the Authors thereof if they are then living for another Term of fourteen years.” Statute of Anne 1710, 8 Ann., c. 19, § XI.

³⁷ *Id.* § 2 (providing for pre-publication registration of the book’s title with the Stationers Company, “in such manner as hath been usual”). On registration with the Stationers Company under the 1662 Licensing Act, see, e.g., Michael Treadwell, *The Stationers and the Printing Acts at the End of the Seventeenth Century*, in 4 THE CAMBRIDGE HISTORY OF THE BOOK IN BRITAIN, 1557–1695, at 755 (John Barnard & D.F. McKenzie eds., 2002).

³⁸ JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 63 (1994) contends that the Statute of Anne was generally consistent with past business practice: “For the trade, the 1710 Act represented a simple continuation of legal and commercial practices which had developed since the middle of the sixteenth century, but which had been under challenge in the absence of any statutory authority since 1695.”

³⁹ See, e.g., Massachusetts Copyright Act of 1783, *supra* note 15; *An Act for the Encouragement of Literature and Genius, and for Securing to Authors the Exclusive Right and Benefit of Publishing Their Literary Productions for Twenty Years*, THE PERPETUAL LAWS OF THE STATE OF NEW HAMPSHIRE 161 (1789), <https://perma.cc/2BQP-UUSC> (“[A]s the principal encouragement such persons can have to make great and beneficial exertions of this nature, must consist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man’s own, than that which is produced by the labour of his mind.”); *An Act for Securing Literary Property*, LAWS OF THE STATE OF NORTH CAROLINA 563 (1791), <https://perma.cc/9KUX-8H6U> (“Whereas Nothing is more strictly a Man’s own than the Fruit of his Study”); *An Act to Promote Literature*, LAWS OF THE STATE OF NEW YORK 99 (1786), <https://perma.cc/V5FU-6E4Q> (“Whereas it is agreeable to the Principles of natural Equity and Justice that every Author should be secured in receiving the Profits that may arise from the Sale of his or her Works”). See generally Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 BULL. COPYRIGHT SOC’Y 11 (1975).

⁴⁰ Crawford, *supra* note 39, at 23–24, states that the registration requirement was for evidentiary purposes—to prove that the claimant was the author or held rights from the author—rather than constitutive of copyright protection.

Indeed, in the U.S., authorities throughout the 19th century conveyed highly mixed messages regarding the nature of copyright and the role of formalities. While courts (including the Supreme Court) often articulated a rigidly positivistic concept of copyright, for which strict adherence to formalities formed a cornerstone,⁴¹ treatise writers eloquently insisted on the natural rights of authorship, generally treating formalities as an administrative afterthought, a means of perfecting title, rather than of divestiture.⁴² Similarly, the Judiciary Committee report accompanying the bill that ultimately became the 1831 copyright amendments, which made registration of the work before its publication an unambiguous prerequisite to the obtaining of federal copyright protection, nonetheless extolled the author's natural entitlement to a property right: "If labor and effort in producing what before was not possessed or known will give title, then the literary man has title, perfect and absolute, and should have his reward."⁴³

Nonetheless, formalities and the highly restricted view of copyright they ultimately symbolized came to dominate the U.S. landscape, particularly following the

⁴¹ See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834) (strict compliance with all statutory formalities held a prerequisite to the vesting of federal copyright protection for published works); *Osgood v. A.S. Aloe Instrument Co.*, 83 F. 470 (C.C.E.D. Mo. 1897) (despite judge's "disposition much in favor of upholding copyrights, and thus securing to authors what seems to be a natural right to the rewards of their own literary labors," holding that author "never acquired a valid copyright" because she failed to fulfill statutory obligations to deposit copies of her book with Library of Congress before publication and to insert proper notice of copyright on the title page). See also *Clayton v. Stone*, 5 F. Cas. 999, 1003 (C.C.S.D.N.Y. 1829) (No. 2,872) (inferring that a "daily price quote" could not be the subject matter of federal copyright protection because its publication was too evanescent to permit compliance with full range of statutory formalities).

⁴² See CURTIS, *supra* note 21, at 193–98; EATON S. DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* 34–35 (1879). See also Stef van Gompel, *Copyright Formalities and the Reasons for Their Decline in Nineteenth Century Europe*, in *PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT* 157, 187–88 (Ronan Deazley, Martin Kretschmer & Lionel Bently eds., 2010), <https://perma.cc/DW7N-GDRM> (observing a similar pairing of natural rights, rhetoric, and formalities in 19th-century Continental European copyright systems).

⁴³ H.R. REP. NO. 21-3 (1830), <https://perma.cc/RV7F-RTUU>. Professor Oren Bracha, in his commentary on this Committee Report, suggests that the Committee's enthusiastic endorsement of authorial property rights reflected the influence of Noah Webster, a tireless advocate of copyright protection, whose son-in-law, Oliver Ellsworth, wrote the Committee Report. See Oren Bracha, *Commentary on the U.S. Copyright Act 1831*, in *PRIMARY SOURCES ON COPYRIGHT (1450–1900)*, *supra* note 7, <https://perma.cc/3CM9-WTXH>.

Supreme Court's 1834 decision in *Wheaton v. Peters*.⁴⁴ The first state and then federal copyright statutes had included formalities modeled on Statute of Anne, but it was not inevitable that they be interpreted as constitutive of copyright, as opposed to predicates to special statutory remedies. Indeed, British authorities since the 18th century had confined the sanction for non-compliance with registration and deposit requirements to restricting the author's or rightsholder's remedies for copyright infringement to those available at common law.⁴⁵ Non-compliance did not endanger the existence of the author's copyright. By contrast, the U.S. Supreme Court in *Wheaton v. Peters* required punctilious compliance, making post-publication copyright a tributary of the many statutory prerequisites.⁴⁶

⁴⁴ 33 U.S. (8 Pet.) 591 (1834). That said, even *Wheaton* acknowledges an inchoate prepublication property right. In *Wheaton*, Justice Story noted that after an author completed the first statutory formality—which required that “the title of the book is to be deposited with the clerk”—“[a] right undoubtedly accrues on the record being made with the clerk, and the printing of it as required.” *Id.* at 664. To be sure, Story also emphasized that while the author's copyright had accrued, title to this copyright was not yet perfect. *Id.*; see also CURTIS, *supra* note 21, at 194 (“[I]t was held by the court, that although the right was vested, when a copy of the title was deposited with the clerk, and a copy of his record was printed . . . that the performance of other conditions was essential to a perfect title.”). Such imperfect title makes good sense in the context of the procedures set forth in the 1790 and 1831 acts, which contemplated that the author's work would not have yet been published. The author, therefore, retained perfect, enforceable title to his common law copyright.

Indeed, these early statutes contained no requirement that the author's work even be completed at the time he decided to deposit a copy of his work's title. Instead, as Story describes, the statute instructed an author to await receipt of the clerk's printed title record, since “the record [the clerk] makes must be inserted in the first or second page” of the copyrighted work for the author's copyright to be effective. *Wheaton*, 33 U.S. (8 Pet.) at 664. Upon completion of the other formalities, the author's title to his copyright was perfected and became good against the world, but for a term of years that related back to the date of the pre-publication title deposit. See Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124 (“the term of fourteen years from the recording the title thereof in the clerk's office”) (emphasis added); see also Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436, 436 (“for the term of twenty-eight years from the time of recording the title thereof”) (emphasis added). Formalities in the Copyright Act were thus designed to function similarly to the recording regimes that continue to regulate secured transactions and other non-possessory interests in property.

⁴⁵ See *Beckford v. Hood*, [1798] 7 TR 620, 101 Eng. Rep. 1164, and the general survey of English caselaw on formalities in Kaplan, *Study*, *supra* note 34, at 63.

⁴⁶ See 33 U.S. (8 Pet.) at 663–64 (“No one can deny that when the legislature are about to vest an exclusive right in an author or inventor, they have the power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law.”).

One might venture different explanations for the centrality of formalities to *Wheaton v. Peters*' delimitation of U.S. copyright. The standard modern account asserts the Framers' and their successors' suspicion of restraints on competition.⁴⁷ In this view, Congress and the courts were far more fearful of monopoly than desirous of fostering authorship. The more stringent the formalities, the more works freely available in the public domain, and the smaller the universe of works over which exclusive rights could be enforced.

An alternative account suggests that the *Wheaton* court's embrace of a highly positivistic, formality-defined approach to copyright was a necessary corollary of the Court's federalism jurisprudence. Henry Wheaton's assertion that noncompliance with federal formalities did not bar his common law copyright claims clashed with the Court's previous rejection of residual state common law patent rights whose assertion undermined federal control of interstate commerce.⁴⁸ Formality-flexible copyright was thus a casualty of the Marshall Court's determination to eliminate barriers to interstate trade and to consolidate federal power.⁴⁹

In light of the Court's federalism jurisprudence, Justice Joseph Story's perhaps otherwise surprising alignment with the *Wheaton* majority becomes more readily understandable. Although Justice Story was an advocate of broad copyright protection,⁵⁰ and probably was sympathetic to Wheaton's common law copyright

⁴⁷ See, e.g., LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 192–94 (1968); but see Nachbar, *supra* note 33, at 45 (modern scholars' attribution of anti-monopoly animus to the framing of early U.S. copyright laws is overstated).

⁴⁸ See Jane C. Ginsburg, *Une Chose Publique?: The Author's Domain and the Public Domain in Early British, French and U.S. Copyright Law*, 65 *CAMBRIDGE L.J.* 636, 664–66 (2006).

⁴⁹ See *Gibbons v. Ogden*, 22 U.S. 1 (1824) (holding Commerce Clause prevailed over any residual state power to grant patent monopolies on steamboat traffic).

⁵⁰ See generally R. Anthony Reese, *The Story of Folsom v. Marsh*, in *INTELLECTUAL PROPERTY STORIES* 259 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

claims,⁵¹ he was also “greatly concerned with the development of [the Court’s] jurisprudence as a tool of national power,”⁵² and had joined or authored the Court’s principal federalism decisions.⁵³

4. The role of the author redux

Nonetheless, one need not view *Wheaton v. Peters* as a perennial rejection of author-centric bases for U.S. copyright. On the eve of the 1909 Act, Justice Oliver Wendell Holmes Jr. offered one of the most enduring (and quoted) pronouncements of author-oriented copyright:

Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright unless there is a restriction in the words of the act.⁵⁴

⁵¹ See Craig Joyce, *The Story of Wheaton v. Peters: “A Curious Chapter in the History of Judicature”*, in INTELLECTUAL PROPERTY STORIES, *supra* note 50, at 36.

⁵² *Id.* at 41; see also R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 74 (1985) (quoting Letter from Joseph Story to Nathaniel Williams (Feb. 22, 1815) (“Let us extend the national authority over the whole extent given by the Constitution. Let us have great military and naval schools; an adequate regular army; the broad foundations laid of a permanent navy; a national bank; a national system of bankruptcy; . . . Judicial Courts which shall embrace the whole constitutional powers; national notaries; public and national justices of the peace, for the commercial and national concerns of the United States.”)).

⁵³ See, e.g., *Gibbons*; *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Cohens v. Virginia*, 19 U.S. 264 (1821).

⁵⁴ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903). Authors today continue to echo Justice Holmes’ understanding of the identification of the work with its author. See, e.g., remarks of Pulitzer Prize-winning playwright Doug Wright:

[C]opyright guarantees us only one thing, one ephemeral, fleeting, but indispensable thing: our singularity as artists. Copyright acknowledges the innate worth of an individual author’s voice; that a well-turned phrase by Philip Roth or an acerbic line of dialogue by Edward Albee, or the haunting melody of “Sunrise, Sunset” by Jerry Bock is as special, as distinctive, as a thumb print or a strand of DNA. . . . Because of copyright, I get to be the CEO of my own imagination. When I create a work, copyright acknowledges that it belongs to me as fully as a newborn belongs to its mother. And just like a parent, I am granted responsibility for its future.

Doug Wright, *Playwrights and Copyright*, 38 COLUM. J. L. & ARTS 301 (2015).

Note here that the default position, in Holmes' view, is copyrightability. Because the author created the work, the work necessarily expresses the author's personality; that expression is copyrightable, unless Congress says otherwise. Holmes has turned *Wheaton v. Peters*' positivism on its head: Rather than searching for an affirmative grant of protection (in that case, for "low" commercial art—a circus poster), Holmes presumes the coverage of creativity and shifts the burden to show that Congress has specifically denied protection. Holmes pays lip service to positivism while in fact employing a rhetorical device that re-centers copyright around the author. As Oren Bracha has observed, Holmes' rhetoric "appropriated the image of the original author whose personality or spirit leaves its unique mark on the world, a mark that is always traceable to the individual who created it."⁵⁵

In the Holmesian justification for copyright, exclusive rights vest in authors because their personalities invest their works. Holmes echoed the French concept of authorship as the stamp of the author's personality ("l'empreinte de la personnalité de l'auteur").⁵⁶ But concepts intermingle and become confused if the named author, whose work supposedly embodies his personality, did not, in fact, create the work. In these instances, the "stamp" of the author's personality seems more like a brand, and the name of the author becomes a trademark.⁵⁷

In a notorious legal dispute in France, which became the subject of a play and a motion picture, Alexandre Dumas' principal ghostwriter, Auguste Maquet, sought unsuccessfully to obtain name recognition despite the contract in which he waived any such claim. In the play, Dumas argues with Maquet, who is demanding more money and threatening to reveal that the "true" author of Dumas's works,

⁵⁵ Oren Bracha, *Commentary on Bleistein v. Donaldson Lithographing Co. 1903*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900), *supra* note 7, <https://perma.cc/9KJP-K9LF>.

⁵⁶ See, e.g., CHARLES CONSTANT, *Quelques Notes Juridiques sur le Droit de L'Auteur Sur Son Œuvre*, in LA FRANCE JUDICIAIRE 341, 343–44 (1895) ("Pour que l'œuvre de l'écrivain ou de l'artiste puisse jouir du droit de propriété que lui reconnaît la loi de 1793, il faut que cette œuvre porte l'empreinte de la personnalité de son auteur."). On Holmes' inspiration from French sources, see Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 329, 370 n.163 (2012) (proposing French graphology as the source for Holmes's views on handwriting/personality).

⁵⁷ See, e.g., Jane C. Ginsburg, *The Author's Name as a Trademark: A Perverse Perspective on the Moral Right of "Paternity"?*, 23 CARDOZO ARTS & ENT. L. REV. 379 (2005); Laura Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377 (2005).

the “real Dumas,” is himself, Auguste Maquet. Dumas expresses his immense disdain for Maquet’s pretensions:

Dumas: And since when am I no longer the author of my works?

Maquet: At least since we’ve been working together. . . .

Dumas: You pretend to be the author of my works? You!

Maquet: Yes.

Dumas: And you have the gall to say that to my face! Author . . . But you don’t even know what the word means! . . .

Maquet: I do. The author is the one who invents, who imagines. He is the only one who may assert the paternity of the works.

Dumas: What do you mean “paternity”? Which paternity? The paternity is mine, Maquet!

Maquet: And why would that be?

Dumas: Because I’m the one who signs. . . .

Maquet: Who said that signing equals paternity?

Dumas: Everyone. The signature designates the author. That’s all there is to it.⁵⁸

So there it is, bright and clear: To be an author is to say one is.⁵⁹ Because Dumas holds himself out to his public as the author of his works, he becomes the author in fact. Later on in the play, Dumas explains why he deserves to be called the author: because his works embody him, because the public sees in them (or thinks it sees in them) the outsized personality of Alexandre Dumas:

[He goes to the bookcase and points out his works.] . . . [He opens a book.] When [my readers] open one of these books, do you know what they find there, Maquet? My heart. Mine. I can die tomorrow; my heart will continue to beat for centuries. Where is your heart, Maquet? Where? Not between these pages! Nor in this bookcase! It’s nowhere. You don’t have a heart. You don’t know what it is to give of oneself. To give with one’s heart. And you never will know. You see this book, well, I touch the person who reads it. And in return I am loved. *[He closes the book.]* And when the reader

⁵⁸ CYRIL GELY & ERIC ROUQUETTE, SIGNÉ DUMAS 80–82 (2003) (translated by author).

⁵⁹ This assertion is not unknown to copyright law. See, e.g., Berne Convention for the Protection of Literary and Artistic Works art. 15.1, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (presumption of authorship).

closes the book, I am a part of his life. Forever. Me and me alone. That's all that matters. That is the sole reason for this book. That's what makes me the author. And who cares by what means, who cares if people learn that I needed a Maquet . . .⁶⁰

Watching the play, it is clear that Dumas delivers this assertion—which, taken out of context, might seem extraordinarily cynical—straight from the heart. The personality of Dumas pervades the *Musketeers*, *The Count of Monte Cristo*, etc., even if to a significant extent Maquet is the one who wrote those books. One might think this a parody of the classic French concept of originality as manifesting the impress, or handprint, of the author's personality, in a situation in which the putative author's hand is absent. The impress of the author's personality becomes a pressing into service of another writer's labors. But, according to the Dumas portrayed in the play, he who has written the words, who has plotted the action, who has drawn the characters, is merely a miserable “pen-pusher,”⁶¹ while it is he, Dumas, who, in signing the work, invests it with the force of his being.

The Dumas-Maquet contract today would be void in France, now that the law makes the moral right of attribution (or “paternity”) inalienable. But, in the U.S., as we shall see, there is no general right to be recognized as the author of one's works. Moreover, under the “works made for hire” doctrine, which we shall shortly examine, Dumas would triumph because the 1976 Copyright Act designates the employer the “author” of an employee-created work.

And the Dumas-Maquet controversy anticipates another conundrum, explored in the final part of this article: Abstracting from the employment relationship, if Dumas gave Maquet a general outline of the plot and characters of his novels and left Maquet to flesh out the rest, would Dumas be the author or co-author of the result? What if Maquet were not a resentful human being, but ChatGPT or some other novel-writing AI, and Dumas provided the prompts?

II. THE 1976 COPYRIGHT ACT (AS AMENDED)

A. Copyright “Subsists” upon Creation and Fixation: Reorienting Federal Copyright Toward Creation Rather than Compliance with Formalities

Until the 1976 Act, federal copyright protection commenced upon publication of the work in compliance with formalities that evolved over time; the immediately preceding federal statute principally imposed a requirement of proper copyright

⁶⁰ GELY & ROUQUETTE, *supra* note 58, at 88–89.

⁶¹ *Id.* at 89.

notice on published copies.⁶² Publication alone did not suffice to bring the work within federal protection; on the contrary, publication without proper notice would cast the work into the public domain.⁶³ Federal copyright thus arose neither from the act of creating a work nor from disseminating it, but rather from distributing copies in the prescribed way to inform the public that the author claimed exclusive rights in her work.⁶⁴ While the Constitution empowers Congress to “promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings,”⁶⁵ pre-1976 copyright acts effectively deemed the promotion of knowledge insufficiently served by the simple vesting of copyright in authors. Instead, they interpolated a *quid pro quo*: no vesting of federal copyright unless the author complied with often-burdensome formalities. By defaulting to the public domain, the pre-1976 Act system in some ways moved authors to the periphery.

The 1976 Act, by contrast, reoriented copyright by declaring that copyright “subsists” in “original works of authorship fixed in any tangible medium of expression.”⁶⁶ Unlike the 1909 Act, which referred to the object of protection as “the copyrighted work,”⁶⁷ the 1976 Act founds protection in original “authorship.”⁶⁸ Moreover, as soon as the author commits her work to a tangible medium, such as

⁶² See generally Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 324–27 (2010) (noting the various formalities required by statute, including the 1909 Copyright Act, that authors needed to satisfy before receiving copyright protections); see also Vincent A. Doyle, George D. Cary, Marjorie McCannon & Barbara A. Ringer, *Study No. 7: Notice of Copyright*, in 1 STUDIES ON COPYRIGHT, *supra* note 34, at 229 (explaining the importance and potential revision of the notice requirement in U.S. copyright law).

⁶³ Doyle et al., *supra* note 62, at 5.

⁶⁴ For extensive discussion of copyright formalities, see generally STEF VAN GOMPEL, *FORMALITIES IN COPYRIGHT LAW: AN ANALYSIS OF THEIR HISTORY, RATIONALES, AND POSSIBLE FUTURE* (2011); Ginsburg, *supra* note 62; Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 487 (2004) (noting the reasons behind various formality requirements in U.S. copyright law, such as providing data on existing copyrights).

⁶⁵ U.S. CONST. art. I, § 8, cl. 8.

⁶⁶ 17 U.S.C. § 102(a).

⁶⁷ Copyright Act of 1909, ch. 320, § 1, 35 Stat. 1075, *repealed and superseded by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

⁶⁸ Copyright Act of 1976 § 102(a), 90 Stat. at 2544.

on paper or in computer memory, copyright arises in the work. And the work remains protected whatever befalls its initial fixation and regardless of subsequent compliance⁶⁹ with formalities.⁷⁰ The 1976 Act, therefore, makes creativity the linchpin of coverage. The text's adoption of the term "subsists" crucially underscores a shift from prior acts' utilitarian exchange towards the natural rights principle of "you create [and fix] it; it's yours."⁷¹

⁶⁹ For works published between January 1, 1978 and February 28, 1989, the notice formality, in less draconian form, remained in force. Copyright owners of works published without notice had five years to cure the omission of notice by registering the work with the Copyright Office and adding notice to accessible copies. See Copyright Act of 1976 § 405, 90 Stat. at 2578–79. Failure to cure the omission of notice would cast the work into the public domain. Even at present, that outcome continues in one respect—if a party published a small number of works between 1978 and March 1989 without notice, then corrected it by registering the work within five years, the Act even in its current form requires all subsequent copies to bear a notice in order to take advantage of the correction allowing continued protection. In theory, therefore, an unnoticed publication in 2025 of a work initially published between 1978 and February 1989 forfeits protection for the work. See 17 U.S.C. §§ 405–06.

⁷⁰ Non-compliance may, nonetheless, constrain the author's ability to enforce her rights. See 17 U.S.C. § 411(a) (United States works must be registered as a prerequisite to initiating an infringement action); *id.* § 412 (statutory damages and attorneys' fees are conditioned on registration before occurrence of infringement). In addition, the Act's restriction of standing to copyright owners, see *id.* § 501(b), thus excluding infringement actions by non-exclusive licensees, can leave some infringements unremedied. *ML Genius Holdings LLC v. Google LLC*, No. 20-3113, 2022 WL 710744 (2d Cir. Mar. 10, 2022), illustrates how standing limitations and formalities combine to undermine copyright enforcement. There, the Second Circuit held that ML Genius's "browsewrap" terms of service, which purported to prohibit unauthorized reproductions of song lyrics licensed by ML Genius and posted on its website, were preempted. As a nonexclusive licensee, ML Genius lacked standing to allege a copyright infringement claim. Furthermore, if the lyrics were not registered with the Copyright Office, the unavailability of statutory damages would likely dissuade the pursuit of a class action on behalf of the copyright owners. Without a threat of litigation, preemption of such claims may effectively allow scraping with impunity. Social media platforms, acting as nonexclusive licensees of the content posted on their site, employ similar terms of service, indicating the potential for a more widespread lack of enforcement against reproduction of licensed content online.

⁷¹ Of course, the "it" must still be an "original work of authorship," and therefore embody a "modicum of creativity." *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 341 (1991).

B. Ownership Protections: Transfers and Termination

1. Transfers and compulsory licenses

With the important exception of works made for hire (discussed below), the 1976 Act vests copyright in the creator(s) of an original work of authorship. The creator thus starts out with rights that she may transfer by contract. Unlike many continental European laws, U.S. copyright law places few limitations on the scope of the rights she may transfer.⁷²

Moreover, unlike those foreign laws, the U.S. copyright act contains few mandatory remuneration provisions.⁷³ Instead, the law imposes some constraints on the validity of a grant. Section 204(a) provides: “A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.”⁷⁴ And because section 101 defines “transfer of copyright ownership” to include both assignments and exclusive licenses, grants of exclusive licenses, like those of assignments, must be manifested in a signed writing to be effective.⁷⁵

Equally significant, the 1976 Act clearly provides that the author’s rights are “divisible,” that is, that “[a]ny of the exclusive rights comprised in a copyright, in-

⁷² Compare 17 U.S.C. § 204(a) (stating that the grant of exclusive rights must be in writing and signed by grantor), with Code de la Propriété Intellectuelle [C. Prop. Intell.] [Intellectual Property Code] arts. L131-9, L132-1–L134 (Fr.) (listing detailed provisions concerning contracts, including rules protecting authors against overreaching transfers).

⁷³ Certain of the limited number of compulsory licenses include mandatory set-asides or percentages for certain classes of creators. See 17 U.S.C. § 114(g)(2) (“Proceeds from Licensing of Transmissions.”).

⁷⁴ *Id.* § 204(a).

⁷⁵ The 1976 Act does not, however, set out any rules regarding the conditions for a valid grant of *non-exclusive* rights—for example, separate grants to several production companies to perform a dramatic work. Such licenses will be valid even without a signed written memorial (although, of course, the practicing attorney will routinely give or take such a license by written agreement). Courts have held that non-exclusive licenses may be oral or inferred from conduct. See *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 556 (9th Cir. 1990). On the other hand, relevant state statutes of frauds, such as those applicable to agreements whose value exceeds \$500, might nonetheless require certain grants of non-exclusive rights to be in writing.

cluding any subdivision of any of the rights specified by section 106, may be transferred as provided . . . and owned separately.”⁷⁶ The combination of divisibility and the requirement of a signed writing may justify a presumption that, when the author assigns something less than all her rights, the scope of a grant made in or after 1978 (the effective date of the 1976 Act) should be interpreted narrowly.

It then would follow that the grant of any exclusive right—for example, the right to reproduce the work in copies—does not, absent express statement in the signed writing, carry with it any other exclusive right, such as the right to perform the work publicly. By the same token, given the statute’s specification that “any subdivision” of exclusive rights can be the object of a transfer, the grant of the exclusive right to perform a work through one medium of communication, such as broadcasting, would not extend to other media, such as webcasting. The author may, of course, authorize exploitation in multiple media, but if the contract does not clearly cover the exploitation at issue, the proposed presumption would exclude it from the scope of the transfer.

This presumption would replace the prior caselaw addressing the “old license/new media” problem. Under the 1909 Act, many cases arose in which, after the passing of years and the development of a commercially remunerative new technology, the parties disputed whether the original grant of rights extended to the new technology, which may have been unknown or at least not commercially viable at the time of the conclusion of the agreement.

The issue came to the fore first when the contract assigned dramatization rights prior to the advent of motion pictures, and later when the assignment covered film rights prior to the advent of television.⁷⁷ More recently, there have been disputes about whether the grant of film rights included the right to make and distribute videocassettes and DVDs of the film,⁷⁸ and whether magazine or book publishing

⁷⁶ 17 U.S.C. § 201(d).

⁷⁷ See, e.g., *Manners v. Morosco*, 252 U.S. 317 (1920) (motion pictures); *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 (2d Cir. 1968) (discussing the scope of “a license of rights in a given medium” in relation to films displayed on television compared to films displayed in theaters).

⁷⁸ See *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 483 (2d Cir. 1998); *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 853 (9th Cir. 1988).

rights encompassed digital versions in e-book form.⁷⁹ All these disputes required the construction of contracts concluded before the effective date of the 1976 Copyright Act.

Under the 1909 Act, questions going to the scope of the grant were thought not to “arise under” federal copyright law; given the absence of federal copyright rules on transfers of rights, these questions did not require the construction of that Act’s provisions.⁸⁰ Rather, the court decisions generally purported to apply state law rules of contract interpretation but did so inconsistently: Some courts emphasized a lack of awareness of the new technology and the obligation of the drafter (usually the large media company) to make its intentions clear,⁸¹ while other courts asserted that new technologies would ordinarily be facilitated through a contract presumption favoring transfer of rights.⁸² By contrast, under the 1976 Act’s provision of some uniform federal rules of copyright transfers, matters going to the validity and scope of the transfers should be considered to “arise under” federal copyright law, and my proposed presumption, or rule of strict contract interpretation, should govern.⁸³

Rules of contract interpretation address negotiated licenses. But not all copyright licenses involve negotiations between the parties. The 1976 Copyright Act imposes a variety of compulsory licenses, whose origins predominantly lay in Congress’ correction of the market power of large copyright holders unwilling to negotiate with, or to propose reasonable terms to, infant industries devising new ways

⁷⁹ See *HarperCollins Publishers LLC v. Open Road Integrated Media LLP*, 7 F. Supp. 3d 363, 366 (S.D.N.Y. 2014); *Random House, Inc. v. Rosetta Books LLC*, 150 F. Supp. 2d 613, 614 (S.D.N.Y. 2001).

⁸⁰ See, e.g., *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964).

⁸¹ See, e.g., *Cohen*, 845 F.2d at 855 (finding that the distribution of videocassettes could not have been permissible under a licensing agreement authorizing “distribution by any means” because the license reserved all rights not expressly granted to the owner and because VCRs were not yet invented at the time of the agreement).

⁸² See, e.g., *Boosey & Hawkes*, 145 F.3d at 486 (discussing Stravinsky’s transfer of music rights for Disney film *Fantasia*, later distributed in videocassettes (citing *Bartsch*, 391 F.2d at 155)).

⁸³ Copyright Act of 1976, Pub. L. No. 94-553, § 204, 90 Stat. 2541, 2570–71 (codified at 17 U.S.C. §§ 101–810); I acknowledge that courts construing post-1977 grants have not clearly articulated such a presumption, but the text of the 1976 Act supports it. Moreover, the presumption advances a policy to secure the rights of authors, in line with the policy goals of the 1976 Act.

to exploit copyrighted works.⁸⁴ The compulsory “mechanical” license inaugurated in the 1909 Act to record nondramatic musical compositions favored the budding phonogram industries, and the cable retransmission licenses established in the 1976 Act and subsequent extensions to satellite transmissions enabled the development of new modes of communicating broadcast television content.

Copyright advocates typically disfavor compulsory licenses as a form of government price-fixing, depressing the price an unregulated market would have afforded.⁸⁵ Others have criticized compulsory licenses as excessively cumbersome and insufficiently responsive to technological and market evolutions.⁸⁶ But more recent compulsory licenses have included a pro-author innovation that may gain the mechanism converts—at least among authors and their advocates. The 1992 Audio Home Recording Act⁸⁷ imposed a levy on digital audio recording devices and media, and established the distribution of the proceeds among the sound-recording and musical-composition beneficiaries of the levy. A musical-compositions fund received 33.33% of the proceeds; these were to be divided equally between “writers” (composers and lyricists) and music publishers. The remaining 66.67% was allocated to the sound recordings fund, with 4% designated for non-featured performers and musicians, and the remainder divided 40% to featured performers and 60% to sound recording producers.⁸⁸

The digital audio amendments have yielded insignificant revenues, largely because the definition of digital audio recording devices and media was too narrowly

⁸⁴ See 17 U.S.C. § 802(f)(1)(D) (identifying rate-setting objectives for Copyright Royalty Judges).

⁸⁵ See, e.g., *Online Entertainment and Copyright Law: Coming Soon to a Digital Device Near You: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Jack Valenti, Chairman, Motion Picture Association of America), <https://perma.cc/7RND-FZ68>.

⁸⁶ See, e.g., Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 976 (2020) (noting that the exclusion of certain new media, such as interactive digital services, from compulsory licensing regime may have slowed technological development in this same field); see also Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2669 (1994) (speculating that compulsory license regimes “may prevent the creation of technologies and organizational innovations that would efficiently administer the rights-clearance process”); Paul Goldstein, *Copyright*, 55 LAW & CONTEMP. PROBS. 79, 84 (1992).

⁸⁷ Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (adding Chapter 10 on digital audio recording devices and media to the 1976 Copyright Act).

⁸⁸ See 17 U.S.C. §1006(b) (“Allocation of Royalty Payments to Groups”).

drawn to reach most contemporary modes of digital home recording.⁸⁹ But its set-aside for creators has proved an enduring technique, substantially benefitting performers through the 1995 and 1998 amendments that created a right of digital audio public performance in sound recordings.⁹⁰

These “webcaster amendments” institute a compulsory license for non-interactive audio streaming and divide the proceeds of the statutory rate evenly among sound recording copyright owners (usually record producers) and performers, with the performers’ share further divided 5% to non-featured performers and 45% to featured artists. By contrast, the compulsory license does not extend to interactive digital transmissions of sound recordings; market negotiations settle the price paid to the copyright owners, generally record companies. Performers’ share will be whatever their contracts provide,⁹¹ and this amount is likely to be substantially less than the compulsory license’s 45%. As a result, while copyright owners would prefer market rate licensing for noninteractive uses, the creators in this instance appear to be better off with government intervention through statutory licensing.

Returning to negotiated licenses, even were there a presumption of strict construction of the scope of a grant, it is possible for a U.S. author, “for good and valuable consideration” (which could be the mere fact of disseminating the work), expressly to assign “all right, title and interest in and to the work, in all media, now known or later developed, for the full term of copyright, including any renewals and extensions thereof, for the full territory, which shall be the Universe.”⁹² A contract of this kind presents no ambiguity as to the scope of the grant and, therefore, no room for a presumption of strict interpretation construing ambiguities against the grantee.

Worse, with one exception, this is a valid contract. The exception is not the extraterrestrial aspect; authors can, it seems, validly grant rights for Mars (although, under principles of territoriality, the law applicable to the substantive copyright

⁸⁹ See Distribution of 1995, 1996, 1997, and 1998 Digital Audio Recording Technology Royalties, 66 Fed. Reg. 9360 (Feb. 7, 2001).

⁹⁰ 17 U.S.C. § 106(6).

⁹¹ *Id.* § 114(g)(1).

⁹² See Jane C. Ginsburg, *The Author’s Place in the Future of Copyright*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS 63 (Ruth L. Okediji ed., 2017). For examples of these kinds of contracts, see *Clauses About General Assignment of Copyright*, COLUM. L. SCH., <https://perma.cc/6MP5-M3FM> (listing various clauses conveying broad assignment of copyright).

matters that the extraplanetary grant covers for that territory may well be Martian⁹³).

2. Termination of transfers

Rather, the exception concerns the author's inalienable right to terminate grants of U.S. rights thirty-five years after the grant's execution (in works other than works made for hire). Thus, even if the contract purports to grant rights in perpetuity and for a lump sum, the author can nonetheless retrieve most of her U.S. rights thirty-five years later.⁹⁴ As the Second Circuit has recognized,

The maximum total duration permitted by the laws of the United States [in a contract conveying rights "for the maximum total duration permitted by the laws in force in each country in the world"] is thirty-five years plus such additional period as the assignor allows until the exercise of the option to terminate.⁹⁵

The 1976 Act termination right is the successor to the authors' reversion rights modeled on the Statute of Anne, incorporated in 1790 in the first U.S. copyright act, and preserved in some form in every subsequent copyright revision. Because the 1976 Act eschewed its predecessors' dual-term structure in favor of a single term based on the life of the author,⁹⁶ it was no longer possible to calculate the reversion based on a second term of copyright. Rather, Congress provided a 5-year window for authors to terminate exclusive and non-exclusive grants beginning 35 years after the execution of the contract. Unlike the 1909 Act reversion rights, which terminated extant grants automatically upon renewal, the 5-year termination window in the 1976 Act provides a "use it or lose it" opportunity. And where 1909 Act reversions covered derivative works as well as the work in its original form,⁹⁷ Congress limited the scope of termination through a statutory carve-out that allows grantees to continue to exploit derivative works "prepared under authority of the grant before its termination . . . but this privilege does not extend to

⁹³ See Marie-Elodie Ancel et al., *International Law Association's Guidelines on Intellectual Property and Private International Law ("Kyoto Guidelines"): Applicable Law*, 12 J. INTEL. PROP., INFO. TECH. & ELEC. COM. L. 44, 48–50 (2021) (discussing choice of law provisions and the scope of the chosen law in licensing agreements).

⁹⁴ 17 U.S.C. § 203. For extensive historical and doctrinal analysis of authors' reversion rights, see Bently & Ginsburg, *supra* note 12, at 1475–76.

⁹⁵ *Ennio Morricone Music Inc. v. Bixio Music Grp.*, 936 F.3d 69, 73 (2d Cir. 2019).

⁹⁶ See 17 U.S.C. § 302.

⁹⁷ See, e.g., *Stewart v. Abend*, 495 U.S. 207, 226 (1990).

the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.”⁹⁸ This means that the derivative works grantee, say a motion picture studio, can continue to exploit the film it based on the grantor’s novel for the full term of the novel’s copyright (if the author assigned rights for the full term), even after the author terminates the grant. But the studio may not, post-termination, make sequels or other works based on the novel without entering into a new agreement with the author once her derivative work rights re-vest.

On the other hand, Congress corrected the 1909 Act caselaw that upheld authors’ advance alienation of their renewal term rights. The statute now provides that “[t]ermination of the grant may be effected notwithstanding any agreement to the contrary.”⁹⁹ Thus, a grant of U.S. rights is “in perpetuity” only if the author fails to terminate it.

Unfortunately, authors or their heirs have not always fared well in court when they seek to enforce their termination rights. For example, courts have upheld some grantees’ assertions that the work was “for hire” and therefore not subject to termination,¹⁰⁰ and they have invalidated termination attempts for failure to comply with the statute’s many formal prerequisites to effectively exercise the right.¹⁰¹ A

⁹⁸ 17 U.S.C. § 203(b)(1).

⁹⁹ *Id.* § 203(a)(5). For a detailed examination of the “any agreement to the contrary” decisions, see Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law’s “Inalienable” Termination Rights*, 57 J. COPYRIGHT SOC’Y U.S.A. 799 (2010).

¹⁰⁰ See, e.g., *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 143 (2d Cir. 2013) (concluding that Kirby’s comic book characters were works made for hire and that therefore he had no right to terminate transfer of copyright to Marvel); *Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc.*, No. 08 CIV. 6143, 2010 WL 3564258, at *8 (S.D.N.Y. Sept. 10, 2010) (finding that certain works by Bob Marley were works made for hire, and therefore heirs were not entitled to renewal term). *But see, e.g., Horror Inc. v. Miller*, 15 F.4th 232, 245 (2d Cir. 2021) (membership in the Writers Guild union did not of itself make a screenwriter an “employee” of a movie series producer, and therefore did not disqualify screenwriter from terminating his grant).

¹⁰¹ E.g., *DC Comics v. Pacific Pictures Corp.*, 545 F. App’x 678, 680 (9th Cir. 2013) (holding that agreement between copyright transferee and beneficiary of life pension granted to “Superman” co-creator Joseph Shuster waived right to termination by statutory heirs of termination right); *Siegel v. Warner Bros. Ent.*, 542 F. Supp. 2d 1098, 1118 (C.D. Cal. 2008) (holding that portions of “Superman” materials were outside of the scope of termination notices due to time limitations and that therefore statutory heirs of co-creator Jerry Siegel failed to terminate copyright grants as to those materials); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 622 (2d Cir. 1982) (holding

2022 study of U.S. authors' exercise of their termination rights concluded that "the U.S. termination laws are of limited use to creators."¹⁰² But that assertion may be unduly pessimistic, because it does not take into account that authors and their grantees may be bargaining in the shadow of the author's inalienable termination right.¹⁰³ That is—as Congress anticipated—the statutory termination provisions do "not prevent the parties to a transfer or license from voluntarily agreeing at any time to terminate an existing grant and negotiating a new one."¹⁰⁴

The statute even incentivizes grantees to propose a better deal as soon as the author (or her heir) has filed a notice of termination, which she may serve up to ten years and no less than two years preceding the effective date of termination.¹⁰⁵ During this pre-termination period, the author may not agree to make a future grant, unless with the original grantee or its successor in title.¹⁰⁶ Of course, the grantee

that termination notice's failure to list five *Tarzan* titles failed to terminate the copyright interest in those titles); Bently & Ginsburg, *supra* note 12, at 1572–87 (discussing caselaw construing termination rights and concluding that legal limits on scope of transfers might serve authors better than termination rights).

¹⁰² Joshua Yuvaraj et al., *U.S. Copyright Termination Notices 1977–2020: Introducing New Datasets*, 19 J. EMPIRICAL LEGAL STUD. 250, 285–86 (2022); see also DYLAN GILBERT, MEREDITH ROSE & ALISA VALENTIN, PUB. KNOWLEDGE, MAKING SENSE OF THE TERMINATION RIGHT: HOW THE SYSTEM FAILS ARTISTS AND HOW TO FIX IT (2019), <https://perma.cc/5WMM-6UJR>.

¹⁰³ The authors recognize this contrasting view:

Finally, we note the Catalog only documents situations in which termination notices have been filed. It casts no light on how creators are using the existence of termination rights to unofficially negotiate return of their rights or a better deal from existing rightsholders. As documented by the Authors' Alliance (n.d.), such negotiations are certainly taking place. Given the expense and complexity of a formal termination, we hypothesize that most of those who file to terminate transfers via the § 203 or 304 processes did so because attempts to do so informally were rebuffed.

Yuvaraj et al., *supra* note 102, at 266.

¹⁰⁴ H.R. REP. NO. 94-1476, at 127 (1976). Some of the caselaw on the termination right concerns revocations in advance of the termination period and regrants. Because the regrants were made by heirs, rather than by the authors, they were not terminable, effectively shutting out the next generation of heirs from the benefits of termination. See, e.g., *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193, 204 (2d Cir. 2008); *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1045, 1048 (9th Cir. 2005).

¹⁰⁵ 17 U.S.C. § 203(a)(4)(A).

¹⁰⁶ *Id.* § 203(b)(4).

need not wait twenty-five years to propose a revocation and re-grant (which would restart the 35-year termination clock). There appears currently to be no empirical study of revocations and re-grants following the filing of a notice of termination or in advance of any filing. However, anecdotal evidence suggests that such renegotiations occur frequently, particularly in the music publishing and motion picture businesses.¹⁰⁷

That said, given its cumbersome implementation, its carve-outs for works made for hire and for derivative works created under authority of the grant before its termination,¹⁰⁸ and its long delay in vesting, the U.S. termination right offers a highly imperfect means of redressing author-grantee bargaining imbalances. Studies of the termination right have proposed a variety of improvements, including earlier vesting of the right, automatic reversion, elimination of the derivative works carve-out, and inclusion of works made for hire.¹⁰⁹

Because extensive industry lobbying during the drafting of the 1976 Act brought about these features,¹¹⁰ any amendments are unlikely to pass. Still, for those authors who benefit directly or indirectly from the termination right, that right's "second bite of the apple" leads U.S. copyright a few steps along the path to becoming a "law of authors' rights." It is, at the least, better than nothing.

C. *Counter-Evidence: No General Attribution Right; Works Made for Hire*

Any assertion that the 1976 Act has moved authors' rights from the periphery toward the center of U.S. copyright must contend with at least two significant statutory shortcomings. First, apart from the exceedingly limited Visual Artists Rights Act, the 1976 Copyright Act does not confer a right to be recognized as the author of one's works. Second, the "works made for hire" doctrine not only divests employee authors and certain freelance creators of copyright ownership, it also deems the employer or commissioning party the statutory "author."

1. Attribution

Of all the abundant counterintuitive features of U.S. copyright law, the lack of an attribution right may present the most significant gap between perceived justice

¹⁰⁷ Email from Eric J. Schwartz, Esq., Partner, Mitchell Silverberg & Knupp, to Jane Ginsburg (Mar. 1, 2022) (on file with author).

¹⁰⁸ 17 U.S.C. § 203(b)(1).

¹⁰⁹ Yuvaraj et al., *supra* note 102, at 286–87; GILBERT, ROSE & VALENTIN, *supra* note 102.

¹¹⁰ Bently & Ginsburg, *supra* note 12, at 1564–68.

and reality, and the greatest counterargument to my contention that copyright is a law of authors' rights. Consistently with the intuitive justice of authorship attribution, even entities whose relationship to copyright is ambivalent acknowledge the basic fairness of giving credit. For example, Creative Commons has long made attribution a default in its parallel copyright universe.¹¹¹

Another example of the fundamental nature of authorship attribution: Many who lack enthusiasm for paying authors, such as many online platforms, query who needs money when free distribution gives authors great exposure.¹¹² Exposure, however, implies credit for the work. Reputation may eventually lead to revenue, but not if those who might pay the author do not know who she is. Whether one creates for glory or for more material gain, being identified with one's work buttresses creativity. As one Federal Court judge aptly put it:

Reputation is critical to a person who follows a vocation dependent on commissions from a variety of clients. Success breeds success, but only if the first success is known to potential clients. To deprive a person of a credit to which he was justly entitled is to do him a great wrong. Not only does he lose the general benefit of being associated with a successful production; he loses the chance of using that work to sell his abilities.¹¹³

Most national copyright laws guarantee the right of attribution (or “paternity”);¹¹⁴ the leading international copyright treaty, the Berne Convention, requires

¹¹¹ CREATIVE COMMONS, *About the Licenses*, <https://perma.cc/Z8L3-GS3J>; see also Richard G. Dudley, *The Changing Landscape of Open Access Publishing: Can Open Access Publishing Make the Scholarly World More Equitable and Productive?*, 9 J. LIBRARIANSHIP & SCHOLARLY COMM'N 2345 (2021) (showing value of exposure in context of academic publishing); Uri Y. Hacoen, Amit Elazari & Talia Schwartz-Maor, *A Penny for Their Creations—Apprising Users' Value of Copyrights in Their Social Media Content*, 36 BERKELEY TECH. L.J. 511, 575 (2021) (survey finding that content-creator “respondents ranked attribution as the single most important feature” in evaluating content platforms).

¹¹² See Brendan James, *Unpaid Huffington Post Bloggers Actually Do Want to Get Paid*, INT'L BUS. TIMES (Feb. 18, 2016), <https://perma.cc/SE4E-ECP8>.

¹¹³ *Prior v Sheldon* (2000) 48 IPR 301 ¶ 87 (Austl.).

¹¹⁴ See, e.g., Loi 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle [Law 92-597 of July 1, 1992 on the Intellectual Property Code], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 3, 1992, art. L121-1 (recognizing an author's “right to respect for his name, his authorship and his work” and is intended to enable the author to be identified as the author of the work on copies or whenever communicated to the public). In Spain,

that Member States protect other Members' authors' "right to claim authorship."¹¹⁵ Yet, perhaps to the surprise of many, no such general right exists in U.S. copyright law nor in other U.S. laws. (The Federal Court judge just quoted sat on the *Australian* Federal Court, not on any U.S. bench.)

U.S. copyright law contains three partial sources of attribution rights. The first is the requirement in section 409 that the application for copyright registration name the author.¹¹⁶ The provision does not specify whether "author" means statutory author, or any creator.¹¹⁷ But the Compendium of the U.S. Copyright Office Practices makes clear that in the case of a work made for hire, the "Applicant" is the statutory author.¹¹⁸ As a result, employee authors have no entitlement to be named in the application. Moreover, section 409 applies only to the registration process; it does not require that publicly distributed or publicly exhibited copies bear the author's name.¹¹⁹

The second partial source of attribution rights is the Visual Artists Rights Act (VARA), whose scope is limited to physical original paintings, prints, drawings and sculptures, and certain photographs, or limited editions of up to 200 signed and numbered copies, and confers rights only as to those originals or copies, not to the incorporeal "work of authorship."¹²⁰ The third is the section 1202 protection against knowing removal or alteration of copyright management information (CMI)—which can (but needn't) include the author's name among other identifying information.

I will not here catalogue the many inadequacies of section 1202's text and judicial interpretation to ensure name credit for authors. Two examples, one textual,

the rights of "personal character" under the 1987 Copyright Act include the author's "right to demand recognition of his authorship of the work." Law No. 22/1987 on Intellectual Property art. 14(iii) (1987) (Spain).

¹¹⁵ Berne Convention, *supra* note 59, art. 6bis.

¹¹⁶ 17 U.S.C. § 409(2).

¹¹⁷ *Id.*

¹¹⁸ U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 804.4(F)(2) (3d ed. 2021).

¹¹⁹ 17 U.S.C. § 409. Copyright notice has been optional since U.S. adherence to the Berne Convention, *id.* § 401; moreover, the name appearing in the notice is that of the "copyright owner," who may not necessarily be the work's creator, *see* COMPENDIUM, *supra* note 118, at § 2205.2(A).

¹²⁰ *See* 17 U.S.C. §§ 101, 106A.

the other from caselaw, will suffice. First, under section 1202(b), the wrongful act is not simply removing the information, or distributing or publicly performing or displaying the work without the information. The statute also requires that those who distribute, perform or display the work (1) have known that the information was removed or altered without the copyright owner's authorization, *and* (2) that those who remove or alter the information, or who distribute or perform works whose information has been removed or altered, do so "knowing, or . . . having reasonable grounds to know that it will induce, enable, facilitate, or conceal an infringement of any right under this title."¹²¹ Thus, even intentional removal or alteration of CMI is not unlawful if the copyright owner cannot show that the person who removed or altered the information also knew that the removal would encourage or facilitate copyright infringement.¹²²

The knowledge standard makes authors particularly vulnerable to the systematic removal of embedded name information when their works are uploaded to platforms or massively copied into the training data of AI systems. Some courts have found that removing CMI due to automated processes is inadvertent and thus not intentional.¹²³ The equation of automation with lack of intent may, however, be a bit facile. For example, if the platform to which photographs are posted itself processes the uploads through a program that the platform knows will excise CMI-bearing metadata, it should not matter that the removal is automated and indiscriminate; setting the default to eliminate embedded CMI, assuming this is a desired result and not merely an unanticipated by-product of some other function, represents a choice by the platform. Consistently with this analysis, the court in *Doe 1 v. Github, Inc.*, a current controversy concerning ingestion of works into training data, rejected the defendants' "semantic distinction" between "the passive non-inclusion of CMI' . . . rather than the active removal of CMI from licensed code."¹²⁴

¹²¹ See 17 U.S.C. § 1202.

¹²² See, e.g., *Gordon v. Nextel Comms.*, 345 F.3d 922 (6th Cir. 2003); *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116 (C.D. Cal. 1999); *Schiffer Publ'g, Ltd. v. Chronicle Books, LLC*, 73 U.S.P.Q.2d 1090 (E.D. Pa. 2004).

¹²³ *Kelly*, 77 F. Supp. 2d at 1122 ("Plaintiff has not offered any evidence showing Defendant's actions were intentional, rather than merely an unintended side effect of the Ditto crawler's operation."); *Stevens v. Corelogic, Inc.*, 194 F. Supp. 3d 1046 (S.D. Cal. 2016), *aff'd*, 899 F.3d 666 (9th Cir. 2018) (offering further examples of automated removal of CMI).

¹²⁴ *Doe 1 v. GitHub, Inc.*, 672 F. Supp. 3d 837, 857 (N.D. Cal. 2023).

Unfortunately, the *Github* district court ultimately dismissed the section 1202(b) claims. The court noted that the amended complaint stated that the output from the source content often involved a modification of plaintiffs' works and, thus, that plaintiffs failed to establish "CMI was removed or altered from an identical copy of the work," as the court erroneously believed was required to bring a successful section 1202(b) claim.¹²⁵ This "identity rule" offers a particularly egregious judicial gloss on section 1202(b). There is no statutory basis for the rule (applied in California federal district courts but not in other circuits) which so obviously circumvents section 1202(b). As the District of Columbia federal district court recently criticized:

[N]othing in § 1202(b) requires precise equivalence between the work from which CMI is removed and the allegedly infringing work. Nor does the Copyright Act's definition of "copy" confine the sweep of that term to a copy in full as opposed to in part. . . . There is also a practical point: it would be odd if a defendant could evade DMCA liability by removing or altering CMI in a copied work but only disseminating 99% rather than 100% of that work. Ultimately, the Court agrees with [the Nimmer] treatise that the arguments requiring perfect identity under these circumstances "fail[] to withstand scrutiny."¹²⁶

Now that the Ninth Circuit has agreed to hear an interlocutory appeal on the application of the "identity" rule,¹²⁷ one may hope that the rule's doctrinal and consequential flaws lead to its rejection, lest section 1202(b) be rendered largely ineffective.

2. Works made for hire

The "works made for hire" doctrine, carried over from the 1909 Act,¹²⁸ denies copyright ownership to employees for works created within the scope of employment, as well as to creators of certain "specially ordered or commissioned works,"

¹²⁵ *Doe 1 v. GitHub, Inc.*, No. 22-cv-06823-JST, 2024 WL 235217, at *14 (N.D. Cal. Jan. 22, 2024).

¹²⁶ *Real World Media LLC v. Daily Caller, Inc.*, 744 F. Supp. 3d 24 (D.D.C. 2024) (citing 4 NIMMER ON COPYRIGHT § 12A.10 (2024)).

¹²⁷ *See Doe 1 v. GitHub, Inc.*, No. 24-7700 (9th Cir. Dec. 19, 2024) (granting motion to appeal).

¹²⁸ *See generally* Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 4 (2003).

provided the parties to the commission contract comply with certain formal requirements.¹²⁹ Worse, the 1976 Act denominates the employer or hiring party, rather than the work's creator, as the statutory "author."¹³⁰ The persistence of the "works made for hire" doctrine seems to undermine my contention that the 1976 Act evolved U.S. copyright toward a law of authors' rights.

Nonetheless, the 1976 Act considerably cabined the doctrine relative to prior law. First, as opposed to the potentially innumerable commissioned works that would qualify as "works made for hire" under the 1909 Act's "instance and expense" test,¹³¹ the 1976 Act limits the commissioned works capable of characterization as works for hire to a closed list of nine enumerated and specific categories.¹³²

¹²⁹ 17 U.S.C. § 101 (defining "work made for hire").

¹³⁰ Compare 17 U.S.C. § 201(b), with Copyright Act of 1909, ch. 320, § 62, 35 Stat. 1075, 1088, repealed and superseded by Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (including employers within the definition of authors without excluding employees).

¹³¹ See, e.g., *Martha Graham Sch. & Dance Found., Inc., v. Martha Graham Ctr. of Contemp. Dance, Inc.*, 380 F.3d 624, 640–41 (2d Cir. 2004) (finding that Plaintiff's works, although not created by direct order of Defendant, were still works made for hire under the instance and expense test because creatives are expected to create works for which they were hired without direct suggestions from the employer).

¹³² Copyright Act of 1976 § 101, 90 Stat. at 2544. The nine categories are works "specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas." The statute also defines audiovisual works, collective works and compilations. The legislative history indicates that these categories were specific and tailored, not capacious and malleable, see H.R. REP. NO. 94-1476, at 121 (1976) ("The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered 'works made for hire' under certain circumstances.").

An amendment to the definition of "work made for hire" to add sound recordings to the list of commissioned works capable of being made for hire upon fulfillment of the other statutory conditions was quickly followed by another amendment repealing the addition of sound recordings and instructing courts to draw no inferences from either the initial amendment or its subsequent repeal. See 17 U.S.C. § 101:

In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment—

Courts have taken care to ensure that works falling outside those categories will not be deemed “works for hire” unless the commissioning party carries the burden of proving that the parties were in an employment relationship.¹³³ Moreover, courts have closely examined whether the parties’ dealings are consistent with a putative employment relationship and that the employee, in fact, produced the work within the scope of her employment.¹³⁴ Similarly, with respect to commissioned works, U.S. courts have interpreted the statute’s additional element of a writing signed by both parties¹³⁵ to require execution before the creator produces the work.¹³⁶ Judge Richard Posner cautioned that “[t]he writing must precede the creation of the

(A) shall be considered or otherwise given any legal significance, or

(B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination, by the courts or the Copyright Office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made for Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

¹³³ See, e.g., *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 736 (1989) (warning against converting commissioned artists into employees, and setting out a test for assessing the existence of an employment relationship); *Horror Inc. v. Miller*, 15 F.4th 232, 245 (2d Cir. 2021) (membership in the Writers Guild union did not of itself make a screenwriter an “employee” of a movie series producer for purposes of copyright law).

¹³⁴ See, e.g., *TD Bank N.A. v. Hill*, 928 F.3d 259, 273 (3d Cir. 2019) (“[A]llowing parties to deem a work as ‘for hire’ without fulfilling the statutory requirements would undercut the Copyright Act’s protection of those termination and moral rights and would negate the difference between a work for hire and an assigned work. That difference underscores why an employee’s work created outside the scope of employment cannot simply be ‘deem[ed]’ for hire.”); *Moonstruck Design, LLC v. Metz*, No. 02 CIV. 4025, 2002 WL 1822927, at *3–4 (S.D.N.Y. Aug. 7, 2002) (finding that a jewelry design was not created within scope of employment when employee was hired to sell jewelry, not to design it).

¹³⁵ That writing must state that the work will be “for hire” and must be signed by both parties.

¹³⁶ See, e.g., *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 412 (7th Cir. 1992) (affirming the district court in finding that a photographer owned the copyrights in photos produced on commission because the work for hire agreement was not signed prior to creation of the works); *Estate of Kauffmann v. Rochester Inst. of Tech.*, 932 F.3d 74, 77 (2d Cir. 2019) (holding that Kauffmann was the author of 44 articles because the written work-for-hire agreement was signed 5 years after the creation of the articles and there were no special circumstances surrounding the written agreement to make it take effect retroactively).

property in order to serve its purpose of identifying the (noncreator) owner unequivocally.”¹³⁷ Without that safeguard, belated formalization could provide the commissioning party the means to extort execution of the writing in return for paying the commission on a now-completed work.¹³⁸

There remains the conundrum of why Congress in the 1909 and 1976 Acts chose to label employers for hire not merely as first owners of copyright, but also as “authors.” In 1909, Congress wanted to ensure that proprietors of multiple-authored works, particularly maps, encyclopedias and other collective works, would be able directly to exercise the renewal right without needing to obtain transfers from a possible plethora of authors. At the time, the category of employers for hire appears principally to have concerned that group of “proprietors,” rather than any person who paid an author to create a work.¹³⁹

But the 1909 Act did not merely list employers among the classes of “proprietors” entitled to copyright renewal; it also provided that “the word ‘author’ shall include an employer in the case of works made for hire.”¹⁴⁰ Denominating employers in that case as “authors” may have conformed to publishing practice for maps and collective works, in which it appears that the publisher registered the works

¹³⁷ *Schiller & Schmidt*, 969 F.2d at 413.

¹³⁸ It also could, years later, retroactively divest creators of works whose copyrights vested upon creation, thus unsettling a variety of expectations in the work. *See Estate of Kauffmann*, 932 F.3d at 78 (“To give the 2004 Agreement the significance adopted by the District Court would risk endorsing a fiction of ‘two separate authors,’ . . . one during the five-year interval before the Agreement was executed and another thereafter. It would also render uncertain several aspects of the copyright in each article, such as its duration, renewal rights, and termination rights.”).

¹³⁹ *See* GOLDSTEIN ON COPYRIGHT § 4.3.1 (3d ed. 2020) (“Section 26 of the 1909 Copyright Act provided that ‘the word “author” shall include an employer in the case of works made for hire.’ The Act nowhere defined works made for hire, but it appears from the legislative history that Congress may have intended the category to be far narrower than the literal phrasing would suggest and to encompass only composite and cyclopedic works.”); *cf.* Borge Varmer, *Study No. 13: Works Made for Hire and on Commission*, in 1 STUDIES ON COPYRIGHT, *supra* note 34, at 717, 734 n.55 (“The Copyright Office survey . . . shows that corporations or other group organizations were the “authors” of 92% of the motion pictures and 93.7% of the periodicals registered. No figure is available for cyclopedic works since they are not registered as a separate class.”).

¹⁴⁰ Section 24 of the 1909 Act includes employers for hire among the classes of proprietors entitled to renew, *see* Copyright Act of 1909, ch. 320, § 24, 35 Stat. 1075, 1080–81, *repealed and superseded by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541; section 62 provides “the word ‘author’ shall include an employer in the case of works made for hire,” *see id.* § 62, 35 Stat. at 1088.

claiming status as their “author,” even though the cartographers and contributors to encyclopedias and periodicals were natural persons other than the human or juridical person of the publisher.¹⁴¹ As these works’ “authors,” those publishers would have been entitled to renew the copyrights under prior statutes that did not explicitly confer a renewal right upon “proprietors.”¹⁴²

The 1976 Act substituted a unitary term for the prior renewal scheme and exempted works made for hire from the author’s termination right, replacing the author’s “second bite of the apple” that renewal afforded. What need, then, to denominate employers as “authors” rather than as indefeasible first owners? The legislative history indicates that motion picture producers believed that the “author” designation would entitle them to rights that some foreign countries reserved to authors, notwithstanding presumptions of transfers of rights to producers.¹⁴³ Other

¹⁴¹ Before the codification of the work-for-hire doctrine in the 1909 Act, juridical persons appear to have claimed authorship for only a narrow subset of works, namely collectively produced works organized by and attributable to a firm (e.g., cyclopedias, maps, and magazines) or works containing expression intended to be attributed to the firm (e.g., user manuals for proprietary merchandise). In the case of publishers of maps and cyclopedias, the earliest card catalog registration records maintained by the Copyright Office reveal that most works registered by these firms were done on assignment or through licenses, in which case the publishing houses laid claim to no more than the title of claimant-proprietor. For these works, a separate column designated the work’s actual author. By contrast, for any works made in-house, such as Rand McNally’s eponymous maps or Garretson, Cox & Co.’s *Columbian Cyclopedias*, no author was listed on the card, in which case employer attribution may have occurred by default. See, e.g., U.S. Copyright Office Registration Card No. 1762, Drawer G-GARZA, <https://perma.cc/XX7Q-AQ99>; *id.* No. 1079, Drawer R-RATTS (maps), <https://perma.cc/9GL9-CCE3>. Similarly, Kodak expressly listed itself as the author of the manual for its Brownie cameras, as did Lippincott for its popular monthly magazine. See *id.* No. 1054, Drawer KLIO-KRITTER, <https://perma.cc/FCR2-ZS7D>; *id.* No. 1867, Drawer LIE-LIPTON, <https://perma.cc/9JJZ-MAFQ>. For a more detailed discussion of pre-1909 registration practices, see Fisk, *supra* note 128.

¹⁴² See Copyright Act of 1831, ch. 16, § 2, 4 Stat. 436, 436–37.

¹⁴³ See Copyright Law Revision: Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Cong. 153 (1963) (statement of Adolph Shimel, Universal Pictures Corp.): “[C]ertain rights are said to flow to an author—particularly in foreign countries, which would vest in others than the employer unless the employer were designated as the author. Now, the number of contributors to a motion picture are many, and in foreign countries, particularly, there may be rights created in authors which would not vest in the corporate owner. And I think that, for purposes of the protection of the motion-picture producer

motion picture producers contended that the great number of artistic contributors to a film precluded any of them from being considered the “author” other than the producer.¹⁴⁴

Or perhaps Congress instituted this labeling sleight of hand to conform—in form—to the constitutional empowerment of Congress to “secure” exclusive rights “to Authors.”¹⁴⁵ The label suggests a cynical conclusion that as long as Congress calls a non-creator an “author,” there is no constitutional quibble with the subject of the initial vesting of rights. But this move clashes with the Supreme Court’s analysis in *Burrow-Giles v. Sarony* that the constitutional term “authors” carries a substantive meaning tied to intellectual creativity.¹⁴⁶ The proposition that an “author”

who creates a composite work through the endeavors of a number of contributors, he should be the author if he is the employer for hire.”

¹⁴⁴ *Id.* at 155 (statement of Joseph Dubin, Universal Pictures Co.); *id.* at 158 (statement of Edward Sargoy, Motion Picture Association of America).

¹⁴⁵ *See id.* (statement of Edward Sargoy) (“I would say we ought to preserve in the statute the principle that an employer for hire could be deemed the author Because the employer may be the full owner of the copyright, as is proposed in this report. If he is not the author, as you are proposing he no longer be called the author, someone must be the author under the Constitution.”).

¹⁴⁶ Surprisingly, no decision appears to have directly addressed the constitutionality of designating non-creators in the 1909 or 1976 Acts as “authors.” A 1939 District of Massachusetts decision dismissed the constitutionality argument on procedural grounds. *See Vitaphone Corp. v. Hutchinson Amusement Co.*, 28 F. Supp. 526, 527 (D. Mass. 1939) (“A contention is made here by the defendant, in its argument, that Congress exceeded its powers in enacting Section 62 of the Act of 1909, as amended, 17 U.S.C.A. § 62, designating an ‘author’ as an employer in the case of works made for hire. This matter was not relied upon by the defendant in its answer to the plaintiff’s substitute declaration filed November 28, 1938. No opportunity was given to the plaintiff to meet this defense nor to the Court to certify to the Attorney General of the United States that the constitutionality of an Act of Congress was brought into question, in order that he might intervene. Chapter 754, § 1, 50 Stat. 75, 28 U.S.C.A. § 401. Although I believe this contention was without foundation, yet it was not open to the defendant on the pleadings.”). Judge Friendly raised some constitutional doubts in his dissent in *Scherr v. Universal Match Corp.*, but would have avoided the constitutional defect by treating the statute as following an assignment logic. *See* 417 F.2d 497, 502 (2d Cir 1969) (Friendly, J., dissenting) (“Although the course of decision has gone past the point where an argument could be mounted on the failure of the definition to say that the word ‘author’ shall *not* include the true author in the case of ‘works made for hire,’ a position the majority’s opinion necessarily entails, it is worth reflecting why the statute is phrased in the curiously back-handed way it is. The rather obvious reason is that the Constitution, Art. I, § 8, authorizes only the enactment of legislation securing ‘authors’ the exclusive right to their writings. It would thus be quite doubtful that Congress

is anyone (or anything, such as a juridical person) Congress chooses to call it heralds arguments that AI outputs lacking human authorship may be protectable under the 1976 Act, a proposition to which we next turn.

III. AI AND HUMAN AUTHORSHIP

A. *Analog Antecedents*

The advent of literary, musical and artistic outputs of generative artificial intelligence tests the role of human authorship in the U.S. copyright system. Not for the first time, as earlier caselaw addressing machine-assisted creation demonstrates. The Supreme Court broadly construed the constitutional terms “authors” and “writings” in *Burrow-Giles Lithographic Co. v. Sarony*,¹⁴⁷ decided in 1884. The Court in that case confronted a constitutional challenge to Congress’s inclusion of photographs in the Copyright Act. The defendant had argued that the photographic process was a purely mechanical one requiring no authorship and that a photograph was not a “writing” as that term was conventionally understood. The Court, however, held that an author is anyone “to whom anything owes its origin” and that a writing is any “production” of an author that includes “all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression.”¹⁴⁸ The Court noted that the photograph in litigation—a posed portrait of Oscar Wilde—exhibited “harmonious, characteristic, and graceful” placement of its subject and, rather than being a purely mechanical reproduction, was “an original work of art, the product of plaintiff’s intellectual invention, of which plaintiff is the author.”¹⁴⁹

could grant employers the exclusive right to the writings of employees regardless of the circumstances. In line with that it has been suggested that, in order to be constitutionally viable, § 26 must be limited to instances where an assignment of future copyright may fairly be implied. NIMMER, COPYRIGHT § 6.3 (1968). However that may be it is surely true that, both in the Constitution and in the Copyright Act, the emphasis is on protecting the ‘author’ and that any principle depriving him of copyright and vesting this in another without his express assent must thus be narrowly confined.”).

¹⁴⁷ 111 U.S. 53 (1884). For a full examination of this decision, see, e.g., JANE C. GINSBURG, DEEP DIVE: BURROW-GILES LITHOGRAPHING V. SARONY (US 1884): COPYRIGHT PROTECTION FOR PHOTOGRAPHS, AND CONCEPTS OF AUTHORSHIP IN AN AGE OF MACHINES (2020).

¹⁴⁸ *Sarony*, 111 U.S. at 58.

¹⁴⁹ *Id.* at 60.



Napoleon Sarony, *Oscar Wilde*, 1882, albumen silver print, Library of Congress, Washington, D.C.

The photograph at issue showed detailed—even compulsive—composition of light effects, camera angle, costuming and posing of the subject and background. Napoleon Sarony’s carefully contrived image dripped Art, and amply met the constitutional standard for the “writing” of an “author,” in that it entailed a “form in which the ideas in the mind of the author are given visible expression.” From *Sarony*, we learn that “intellectual invention” characterizes authorship, and that machines may participate in giving “visible expression” to the author’s conceptions.¹⁵⁰

¹⁵⁰ Sarony’s “giving visible expression” did not in fact extend to the decision when to activate the shutter; Sarony’s cameraman made that determination, but the decision does not consider his role in the creation of the photographic image, *see, e.g.*, Eva E. Subotnik, *The Author Was Not an*

But what of outputs in whose production human intervention is more attenuated? These may result from random processes, whether impelled by Mother Nature or by machines. For example, in *Kelley v. Chicago Park District*,¹⁵¹ the Seventh Circuit ruled that an installation of wildflowers planted in Chicago's Grant Park lacked sufficient authorship because the patterns of wildflowers primarily resulted from natural forces. The U.S. Copyright Office's Compendium states, in general, that the Office will not register "works that lack human authorship."¹⁵²

Similarly, the Court of Appeals for the Ninth Circuit held that a crested macaque could not sue under the Copyright Act for the alleged infringement of photographs that the monkey had taken of himself, for "all animals, since they are not human," lacked statutory standing under the Act.¹⁵³ In particular, section 313.2 of the Compendium specifies that "[t]he Office will not register works produced by nature, animals, or plants," "the Office cannot register a work purportedly created by divine or supernatural beings," and "the Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author."¹⁵⁴

The Office does not categorically reject any role for randomness in the creative process. Rather, copyrightability turns on "creative input or intervention from a human author." Jackson Pollock's "splatter paintings" enjoy copyright protection even though, as Dan Burk observed, the "exact shape and placement [of the patterns that occur on the canvas] are subject to kinetic forces not precisely calculated, nor entirely within his control once they leave the brush or other implement within

Author: The Copyright Interests of Photographic Subjects from Wilde to Garcia, 39 COLUM. J.L. & ARTS 449, 450 (2016); Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 434–35 (2004).

¹⁵¹ 635 F.3d 290 (7th Cir. 2011). The court distinguished works that incorporate living elements, such as a sculpture composed partly of plantings of flowers, from productions consisting entirely of living elements: "To the extent that seeds or seedlings can be considered a 'medium of expression,' they originate in nature, and natural forces—not the intellect of the gardener—determine their form, growth, and appearance." *Id.* at 304. The court appears not to have considered whether the "gardener's" artistic vision includes the alterations nature will bring, and whether the "gardening" was designed to channel nature to that vision. In those circumstances, a distinction based on the ratio of "natural" to human-made elements may not be warranted.

¹⁵² COMPENDIUM, *supra* note 118, at § 313.2.

¹⁵³ *Naruto v. Slater*, 888 F.3d 418, 420 (9th Cir. 2018).

¹⁵⁴ COMPENDIUM, *supra* note 118, at § 313.2.

his grasp. The exact radius of gyration and trajectory of paint droplets flung from his brush is neither known nor anticipated. However, the bodily movements that propel the paint are controlled, and the unanticipated or indeterminate outcome is itself anticipated.”¹⁵⁵ In 1970, Dorothy Pennington Keziah, then Head of the Music Section, Examining Division, of the Copyright Office, considered the copyright protection of “aleatory and indeterminate musical compositions.”¹⁵⁶

One could argue that, where composers have used the flip of a coin, the toss of the dice, tables of random numbers, etc. to determine their tonal, rhythmic, and even structural materials, chance rules directly and absolutely; the id, ego, and superego of the composer are in no way involved and do not express themselves in an original manner in the resultant writing. On the other hand, it could be argued that if the composer selects the materials he uses and makes all the decisions necessary to set up the mechanism of chance, the seemingly spontaneous, unreflective process of creation is not really accidental at all. In any case, the result is not entirely responsive to chance. “What happens . . . is that a human being has to decide what goes into the chances. . . . And since he’s human, his expression enters into it.”¹⁵⁷

In both examples, authorship entails the exercise of some control over the execution of the work, incorporating, but channeling, randomness by setting the bounds within which external forces may operate. As Keziah concluded, “the mere use of chance procedures as a compositional aid should not be a bar to copyright protection.”¹⁵⁸ Of course, that precept does not tell us when human endeavors at determinacy yield to “chance procedures,” whether animal or digital.

¹⁵⁵ Dan L. Burk, *Thirty-Six Views of Copyright Authorship, by Jackson Pollock*, 58 HOUS. L. REV. 263, 272 (2020).

¹⁵⁶ Dorothy Pennington Keziah, *Copyright Registration for Aleatory and Indeterminate Musical Compositions*, 17 BULL. COPYRIGHT SOC’Y U.S.A. 311 (1970) (cited in Zvi S. Rosen, *What Does John Cage Have to Do with AI Authorship?*, MOSTLY IP HIST. BLOG (Nov. 29, 2024), <https://perma.cc/ZTK3-7M5L>).

¹⁵⁷ *Id.* at 319 (citation omitted).

¹⁵⁸ *Id.* at 320 (“It would seem that the aleatory composer ‘guides’ the ultimate expression of his work through his selection and handling of the chance materials, whether they be dice, charts, coins, or whatever, in a way similar to the way a composer of computer music guides the development of his work. If this is true, the mere use of chance procedures as a compositional aid should not be a bar to copyright protection.”).

B. Copyright Office Determinations

In the realm of AI art, the Copyright Office has maintained that something more than mere *de minimis* authorial control is required when generating such works.¹⁵⁹ In particular, when analyzing an application to register such a work, the Copyright Office will consider

whether the “work” is basically one of human authorship, with the computer [or other device] merely being an assisting instrument, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually conceived and executed not by man but by a machine.¹⁶⁰

The Office has, thus far, rejected the registration of AI-generated outputs four times,¹⁶¹ but has also registered AI-assisted works.¹⁶² The first rejection concerned an image that the applicant, in what appears to have been a test case, alleged was the wholly autonomous output of a machine:¹⁶³

¹⁵⁹ See Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16,190, 16,193 (Mar. 16, 2023) (“AI-generated content that is more than *de minimis* should be explicitly excluded from the application.”).

¹⁶⁰ *Id.* at 16,192 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 11 U.S. 53, 60 (1884)); see also U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2: COPYRIGHTABILITY 1–2 (2025).

¹⁶¹ Letter from Copyright Review Board, U.S. Copyright Off., to Ryan Abbott, Brown Neri Smith & Khan LLP, *Re: Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise* (Feb. 14, 2022), <https://perma.cc/3U5T-W675> [hereinafter Letter from U.S. Copyright Office, *Re: Thaler’s Second Request*]; Letter from Robert J. Kasunic, U.S. Copyright Off., to Van Lindberg, Taylor English Duma LLP, *Re: Zarya of the Dawn* (Feb. 21, 2023), <https://perma.cc/5XZK-A2HB> [hereinafter Letter from U.S. Copyright Office, *Re: Zarya of the Dawn*]; Letter from Copyright Review Board, U.S. Copyright Off., to Tamara Pester, *Re: Second Request for Reconsideration for Refusal to Register Théâtre D’opéra Spatial* (Sept. 5, 2023), <https://perma.cc/EG4Z-AANT> [hereinafter Letter from U.S. Copyright Office, *Re: Allen’s Second Request*]; Letter from Copyright Review Board, U.S. Copyright Off., to Alex P. Garens, Day Pitney LLP, *Re: Second Request for Reconsideration for Refusal to Register SURYAST* (Dec. 11, 2023), <https://perma.cc/FF5A-W6M5> [hereinafter Letter from U.S. Copyright Office, *Re: Sahni’s Second Request*].

¹⁶² See U.S. Copyright Office Registration No. VAu001528922 (Mar. 21, 2023) (“Rose Enigma”) (discussed *infra*); U.S. Copyright Office Registration No. VAU001543942 (Aug. 5, 2024), <https://perma.cc/KFZ4-QHZ3> (“A Single Piece of American Cheese”) (discussed *infra*).

¹⁶³ At later stages in the proceedings, after the close of the administrative record, the Applicant endeavored to argue that the image was not in fact wholly autonomously generated, that there was human participation in the prompting of the machine, but both the Copyright Review Board and



Stephen Thaler, *A Recent Entrance to Paradise*, 2012. AI-generated digital image.

The asserted absence of human participation made it an easy case for the Copyright Office; the D.C. Circuit agreed: “[T]he Copyright Act of 1976 requires all eligible work to be authored in the first instance by a human being.”¹⁶⁴ Elaborating further, and eschewing interpretation of the constitutional term “Writings of Authors,”¹⁶⁵ the court continued:

Authors are at the center of the Copyright Act. . . . The Copyright Act does not define the word “author.” But traditional tools of statutory interpretation show that, within the meaning of the Copyright Act, “author” refers only to human beings. To start, the text of multiple provisions of the statute indicates that authors must be humans, not machines. In addition, the Copyright Office consistently interpreted the word author to mean a human prior to the Copyright Act’s passage, and we infer that Congress

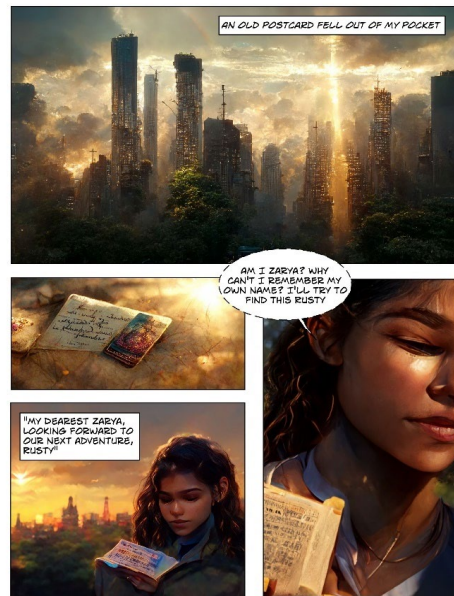
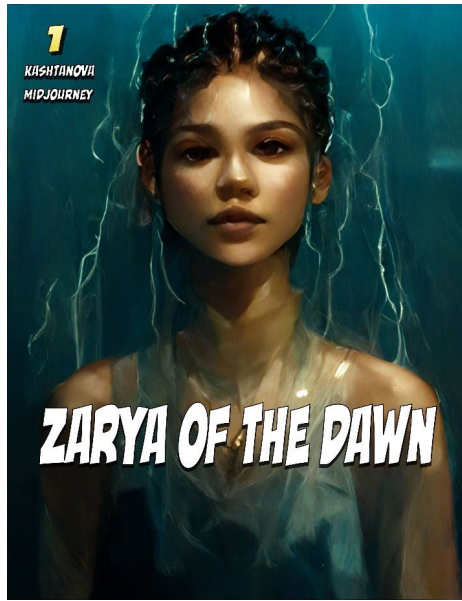
the federal District Court for the District of Columbia ruled that contention came too late. For initial rejection, see Letter from U.S. Copyright Office to Ryan Abbott, Brown Neri Smith & Khan LLP, *Re: A Recent Entrance to Paradise* (Aug. 12, 2019). For the Copyright Review Board decision, see Letter from U.S. Copyright Office, *Re: Thaler’s Second Request*, *supra* note 161; *see also* Thaler v. Perlmutter, 687 F. Supp. 3d 140 (D.D.C. 2023), *aff’d*, 130 F.4th 1039 (D.C. Cir. 2025).

¹⁶⁴ Thaler v. Perlmutter, 130 F.4th 1039, 1041 (D.C. Cir. 2025). As the District Court put it, “Copyright has never stretched so far, however, as to protect works generated by new forms of technology operating absent any guiding human hand, as plaintiff urges here. Human authorship is a bedrock requirement of copyright.” *Thaler*, 687 F. Supp. 3d at 146.

¹⁶⁵ *Thaler*, 130 F.4th at 1041 (“[W]e need not address the Copyright Office’s argument that the Constitution itself requires human authorship of all copyrighted material”).

adopted the agency’s longstanding interpretation of the word “author” when it reenacted that term in the 1976 Copyright Act.¹⁶⁶

In the second decision, in a letter canceling the registration of the individual images of an AI-generated graphic novel, the Office concluded, “Because [the AI technology] starts with randomly generated noise that evolves into a final image, there is no guarantee that a particular prompt will generate any particular visual output.”¹⁶⁷



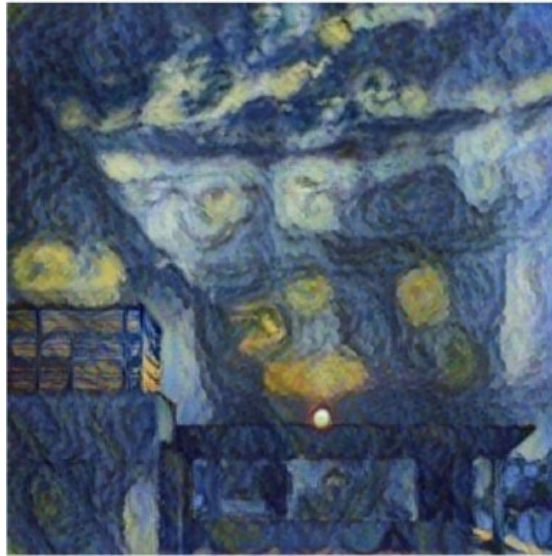
(Left) Kris Kashtanova, Cover of *Zarya of the Dawn*, 2022. AI-generated image with human modifications, created using Midjourney and edited by the artist; (Right) Page 2 of *Zarya of the Dawn*.

Similarly, in upholding the Office’s rejection of a two-dimensional artwork consisting of a mashup of the applicant’s original photograph together with a copy of Vincent van Gogh’s *The Starry Night*, the Review Board focused on the lack of control on the part of the applicant in generating the combined image, concluding that the applicant

¹⁶⁶ *Id.* at 1045.

¹⁶⁷ Letter from U.S. Copyright Office, *Re: Zarya of the Dawn*, *supra* note 161, at 9–10. The Office did, however, find the human-created text and the selection and arrangement of images to be copyrightable. See U.S. Copyright Office Registration No. TXu002356581 (Sept. 15, 2022), <https://perma.cc/47GK-HZGV>.

provided three inputs to [the AI program]: a base image, a style image, and a ‘variable value determining the amount of style transfer.’ . . . Because [the applicant] only provided these three inputs. . . the [AI program], not [the author], was responsible for determining how to interpolate the base and style images in accordance with the style transfer value.¹⁶⁸



(Top) Ankit Sahni, SURYAST, 2021. Digital image created using RAGHAV AI application, based on an original photograph by Ankit Sahni and styled after Vincent van Gogh’s “The Starry Night.” (Bottom Left) Original photograph by Sahni. (Bottom Right) Vincent van Gogh, *The Starry Night*, 1889. Oil on canvas, The Museum of Modern Art, New York.

Notably, the Review Board further concluded that the AI program’s

¹⁶⁸ Letter from U.S. Copyright Office, *Re: Sahni’s Second Request*, *supra* note 161, at 7.

interpretation of [the applicant’s] photograph in the style of another painting is a function of how the model works and the images on which it was trained on—not specific contributions or instructions received from [the applicant.] While [the applicant] selected the numerical variable for the ‘strength’ of the style, that choice alone is insufficient to warrant copyright protection.¹⁶⁹

In another example, the Review Board affirmed the Office’s refusal to register Jason M. Allen’s submission, “Théâtre D’opéra Spatial,” which Midjourney, a text-to-picture AI service, generated:¹⁷⁰



Jason M. Allen, *Théâtre D’opéra Spatial*, 2022. AI-generated digital image created using Midjourney, edited with Adobe Photoshop, and upscaled with Gigapixel AI.

Although Mr. Allen declined to provide the information requested in the *Copyright Office Guidance*, he stated that he input at least 624 revisions and text prompts, and used Adobe Photoshop to modify his finally-selected image. But these acts did not suffice to constitute human control, according to the Review Board, because “the steps in that process were ultimately dependent on how the Midjourney system processed Mr. Allen’s prompts.”¹⁷¹

According to the Review Board, although 624 prompts appear to be a high number, “because Midjourney does not treat text prompts as direct instructions, users may need to attempt hundreds of iterations before landing upon an image

¹⁶⁹ *Id.* at 8.

¹⁷⁰ Letter from U.S. Copyright Office, Re: Allen’s Second Request, *supra* note 161.

¹⁷¹ *Id.* at 6.

they find satisfactory. This appears to be the case for Mr. Allen.”¹⁷² Ultimately, in seeking to discern human control over random processes and citing the Office’s *Guidance*, the Review Board held,

[W]hen an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the “traditional elements of authorship” are determined and executed by the technology—not the human user. . . . And because the authorship in the Midjourney Image is more than *de minimis*, Mr. Allen must exclude it from his claim.¹⁷³

Mr. Allen has now appealed the Copyright Office’s refusal to register to the federal District Court for Colorado.¹⁷⁴

The Copyright Office has not rejected the possibility that an accumulation of creative prompts might cross the threshold into adequate human authorship, but it has made clear that the prompts must exert determinative control over the output.¹⁷⁵ Simply reiterating prompts that trigger the same random processes will not suffice. After 624 prompts yielding 2496 images, Mr. Allen may have found an image that corresponded to his vision for the work, but simply selecting an image from a large number of alternatives does not make one the author of the chosen picture (nor of the other 2495). In that respect, the applicant is no different from others who perceive aesthetic merit in objects they did not create, such as driftwood (which the Copyright Office will not register),¹⁷⁶ or in “found objects” such as bottle racks or urinals.¹⁷⁷

¹⁷² *Id.* at 7.

¹⁷³ *Id.* For a discussion on this and more general questions pertaining to the interplay between artificial intelligence and copyright law, see generally Library of Congress, Copyright Office [Docket No. 2023-6], Artificial Intelligence and Copyright, 88 Fed. Reg. 78,393 (Nov. 15, 2023).

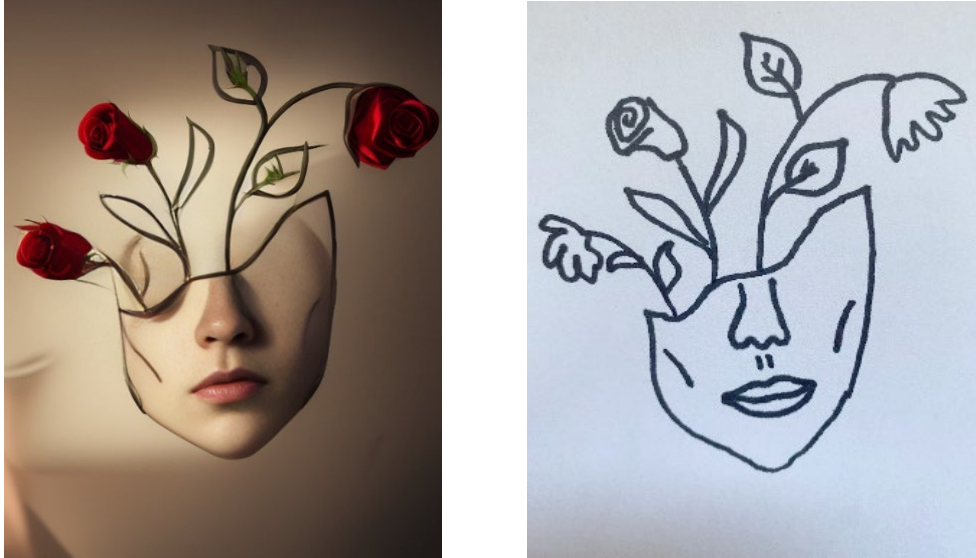
¹⁷⁴ See *Allen v. Perlmutter*, No. 1:24-cv-02665 (D. Colo. filed Sept. 26, 2024).

¹⁷⁵ See U.S. COPYRIGHT OFF., *supra* note 160, at 18–22.

¹⁷⁶ See COMPENDIUM, *supra* note 118, at § 313.2.

¹⁷⁷ The Copyright Office’s policy is not inconsistent with the Second Circuit’s dictum in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 105 (2d Cir. 1951), in which the court posited that “[a] copyist’s bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the ‘author’ may adopt it as his and copyright it.” Judge Jerome Frank’s remarks reject a requirement that the author have intended to create the result; they do not challenge the need for the author to

By contrast, the Office has registered a photo-realist image produced using Stable Diffusion from a hand-drawn underlying image created by the Applicant:¹⁷⁸



(Left) Kris Kashtanova, *Rose Enigma*, 2023. Mixed media: AI-generated image using Stable Diffusion based on artist's sketch input (right).


Applicant satisfied the Examining Division that her prompts sufficiently controlled the production of the image so that, far from initiating a random process, “if someone with access to the same ControlNet Depth and Stable Diffusion 1.5 models used by Kashtanova were to input Kashtanova’s exact textual prompt, image input, and other settings, along with the same seed, that person would generate the Work.”¹⁷⁹ Applicant’s letter to the Examining Division included an extensive chart detailing how “the Work visually expresses Kashtanova’s original mental conception for it. . . . Kashtanova chose the Work’s subject and how to render that

have created it. Authorship-by-adoption still requires a predicate and proximately causal act attributable to the author. For a fuller discussion of why adoption alone does not suffice, see Jane C. Ginsburg & Luke Ali Budiardjo, *Authors and Machines*, 34 BERKELEY TECH. L.J. 343, 367–70 (2019).

¹⁷⁸ See U.S. COPYRIGHT OFF., REGISTRATION NO. VAU001528922 (Mar. 21, 2023) (Kristina Kashtanova, claimant, “Registration limited to unaltered human pictorial authorship that is clearly perceptible in the deposit and separable from the non-human expression that is excluded from the claim.”).

¹⁷⁹ Letter from Heather M. Whitney & Joseph Gratz, Morrison & Foerster LLP, to Robert J. Kasunic, U.S. Copyright Office, <https://perma.cc/X2YB-NQ5V> (cover letter for “Rose Enigma” copyright application).

subject, and exercised control over Stable Diffusion to ensure that the executed Work realized their mental conception.”

Mechanism of Control	Kashtanova’s Selection for Each Mechanism of Control	Kashtanova’s Creative Contribution to the Work by Their Selection
ControlNet Model	Depth	Rendition of Subject Matter (e.g., distance of the subject from the viewer)
Textual Prompt	“a young cyborg woman (((roses))) flowers coming out of her head, photorealism, cinematic lighting, hyper realism, 8 k, hyper detailed.”	Selection of Subject Matter and Rendition of Subject Matter (e.g., design, lighting, and style)
Image Input		Rendition of Subject Matter (e.g., linear contours and design)
CFG Scale Number	7	Rendition of Subject Matter (by choosing how closely Stable Diffusion must adhere to the image input and textual prompt)
Sampling Steps	40	Rendition of Subject Matter (by choosing the

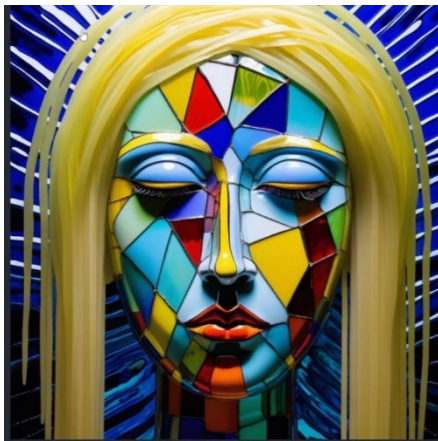
Detail of Chart included in Registration Cover Letter for *Rose Enigma*

For future applicants hoping to show that their control over the AI program’s execution of their prompts determined the outcome of the process, Kashtanova’s letter may serve as a template. The Copyright Office, however, does not require applicants to detail their creative procedures.¹⁸⁰ The Office’s current Guidance (which

¹⁸⁰ See Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16,190, 16,193 (Mar. 16, 2023) (requiring only that registrants disclaim AI-generated portions of work and offer “brief explanation of the human author’s contributions”).

it will be supplementing) requests that applicants identify and disclaim more than *de minimis* AI-generated content; that direction was not intended to imply a requirement of an accounting of authorship.

Most recently, the Copyright Office registered a visual work, “A Single Piece of American Cheese,” consisting entirely of AI-generated components; the basis of the claim was “[s]election, coordination, and arrangement of material generated by artificial intelligence,” excluding “AI generated image components”.¹⁸¹



Robbie Barrat, *A Single Piece of American Cheese* (before and after inpainting), 2023.
AI-generated digital image created using Stable Diffusion.

The Copyright Office initially rejected the application for lack of human authorship, but subsequent correspondence between the Applicant and the Office led to the work’s registration. Applicant stated that he “first generated an AI image with [an image-generation program]. Then, he used a process called ‘inpainting,’ which allowed him to highlight specific regions of the image and generate new AI elements in that area with a new prompt. He added roughly 35 of these AI edits to the

¹⁸¹ U.S. Copyright Office Registration No. VAU001543942, *supra* note 162.

original AI image, ultimately resulting in the final image.”¹⁸² Applicant’s description of his creative process satisfied the Examiner that the image “contains a sufficient amount of human original authorship in the selection, arrangement, and coordination of the AI-generated material that may be regarded as copyrightable.”

Note that, as with Kashtanova’s *Zarya of the Dawn*, the individual AI-generated components were not covered by the registration, even though the “inpainting” process (which Kashtanova did not employ for *Zarya*) commenced with cursor-drawn highlights of particular portions of the initial AI-generated image that the AI program subsequently converted to a photo-realist format. Nonetheless, the absence of protection for the separate components of the image probably is of little consequence because, unlike the individual images of the *Zarya* graphic novel, the image as a whole is a collage of those components.

It may be possible to separate out the individual collaged elements, but there likely is little value to copying those components, apart from their assemblage into the entire image. To take an analog example, the copyright in a cubist painting that incorporates images copied from contemporary newspapers would not extend to pages ripped from *Le Journal* or *Le Figaro*, but the work of art, and its economic value, consists in how Picasso, Braque or Juan Gris incorporated that element into the overall composition of the painting.

¹⁸² Katelyn Chedraoui, *This Company Got a Copyright for an Image Made Entirely With AI. Here’s How*, CNET (Feb. 10, 2025), <https://perma.cc/EB6K-PN2H>.



Juan Gris, *The Table*, 1914, paper, opaque watercolor, and charcoal on canvas, 23½ × 17½ inches, Philadelphia Museum of Art.

Thus, even when the human reworking of an initial AI output intermingles the human and AI contributions in a way that eludes separation of the human- and machine-generated contributions as to any particular component of the output, the overall putting-together of the final work should manifest sufficient human authorship to warrant copyright in the whole.

C. *Moving the Goal Posts on Authorship: Proximate Versus But-For Causation*

The argument on appeal in *Thaler v. Perlmutter* (albeit not in the written submissions) departed from the Applicant's initial position that the image was wholly autonomously machine-generated, to contend that human authorship lay in Applicant's creation of the machine, and in the initial, very general prompting.¹⁸³ In effect, while the Copyright Office has maintained that the putative author must be

¹⁸³ The D.C. Circuit's opinion does not address this contention; the court held that Thaler had waived any claim of human authorship. *See Thaler v. Perlmutter*, 130 F.4th 1039, 1041 (D.C. Cir. 2025) ("Nor do we reach Dr. Thaler's argument that he is the work's author by virtue of making and using the Creativity Machine because that argument was waived before the agency.").

the proximate and determinative cause of the output, the Applicant was conceding the need for human authorship, but urging a kind of but-for causation to identify sufficient human participation in the machine's output. In that construct, the human role would consist of creating and entering the prompts that result in an output. The prompts, it seems, need not be especially detailed, just enough to get the generative process going. But-for causality surpasses assertions of authorship of found objects (finding is not a cognizable causal act for the purposes of copyright), but this concept of authorship¹⁸⁴ would be exceedingly attenuated, paying lip service to human agency in order to vastly augment the universe of machine-generated copyrighted works.

But-for causes may stretch infinitely back in the creative process. But we would not say that the logger who felled the tree that the pencil manufacturer used to fashion the writing implement that the author employed to create a work was an author of the resultant text.¹⁸⁵ Nor that the inventor of the point-and-shoot camera thereby became the author or coauthor of all photographs made using that camera. And we would not say that the teacher who helped a writer develop her style was the author of the writer's works, or even her coauthor, and this is true even if in the absence of the teacher's aid the writer might never have become a writer. To speak of but-for causation as to AI outputs requires a starting point past the stages of invention of the machine or the compilation of the training data or even the development of the large language model with which the prompts will interact.

But-for advocates would define the pertinent causal act as the devising and inputting of the prompts.¹⁸⁶ The prompts need not be so detailed as to constrain the machine to generate the same output every time (as assertedly was the case for "Rose Enigma"); were the prompts to meet that standard, they would likely be

¹⁸⁴ On the relationship between causation and authorship, see generally Shyamkrishna Balganes, *Causing Copyright*, 117 COLUM. L. REV. 1 (2017); Burk, *supra* note 155.

¹⁸⁵ But we would say the logger who felled the tree whose broken branch assumed a sculptural form was the author of the sculpture, even though the logger did not intend to make a sculpture. The logger caused the tree to fall in a way that broke the branch in an aesthetically pleasing way, and she or he adopted the result. See *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 105 (2d Cir. 1951); Ginsburg & Budiardjo, *supra* note 177, at 367–70 (discussing causation and adoption).

¹⁸⁶ See, e.g., Kyle Jahner & Aruni Soni, *AI Art Copyright Stays Doubtful After Appeals Court Argument*, BLOOMBERG LAW (Sep. 19, 2024) (summarizing argument advanced by appellant's counsel in *Thaler v. Perlmutter*).

found a proximate and determinative cause of the output, in which case ordinary copyright principles would hold that the prompt-writer’s activities constitute authorship of the output. A but-for concept of authorship would do the work of deeming more outputs copyrightable if the inputs left more control to the machine. But-for causation would embrace the inputting of commands situated at the lower end of the scale from idea suggestion to development of a fully elaborated work. For example, were St. Exupéry’s *Little Prince* to order DALL-E or Midjourney to “Draw me a sheep!” that prompt would barely constrain the machine’s choices for how to execute the command.



(Left) Antoine de Saint-Exupéry, Cover of *Le Petit Prince* (Gallimard ed. 1946).

(Right) Images generated by Midjourney with the prompt “Draw me a sheep.”

By contrast, “Draw me a sheep with fluffy purple curls and a diabolical face furiously butting the Little Prince on his asteroid while his Rose looks on approvingly, enjoying the scene” (assume St. Exupéry’s work is in the public domain¹⁸⁷)

¹⁸⁷ St. Exupéry died in 1944; in countries whose copyright duration is 70 years post mortem, *The Little Prince* went into the public domain in 2014. In the US, the term of copyright for works published before 1978 is 95 years from first publication. Published in 1944, *The Little Prince* will remain under copyright in the U.S. until 2039.

considerably limits the machine’s choices, but nonetheless leaves substantial leeway for variation on the theme:



(Top) Image generated by Midjourney with the prompt, “Draw me a sheep with fluffy purple curls and a diabolical face furiously butting the Little Prince on his asteroid while his Rose looks on approvingly, enjoying the scene.” (Bottom) Outputs generated by Dall-E from the same prompt.

The first prompt is an unprotectable idea. The second might contain sufficient copyrightable expression to count as a literary work in its own right. Two questions arise: First, does the statute accommodate a concept of authorship that would result in finding the outputs of these prompts copyrightable works; and second, should it?

Doctrinally, recognition of authorship in these situations would clash with the Copyright Act in at least two ways. In the two scenarios, the prompt-giver resembles the hiring party for a commissioned work. But were the machine a human being, neither prompt would make the result a “work for hire,” whose hiring party would be the statutory “author.” The statute limits the kinds of commissioned

works capable of being works for hire, and free-standing images are not on the list.¹⁸⁸

Moreover, the statute also requires that the commission for the enumerated category of works be set out in writing, signed by both parties, stating that the work will be “for hire.”¹⁸⁹ In a but-for scenario, these conditions cannot be complied with because the hiring party and the creator of the work would be the same person. But-for causation would effectively circumvent statutory protections for freelance authors.

Similarly, the caselaw on joint works rejects the co-authorship pretensions of mere idea-suggesters.¹⁹⁰ Even where the putative co-author’s suggestions rise to the level of copyrightable contributions, courts have required that the contributors share an intent to be co-authors before the courts will consider that the principal author’s acceptance of suggestions resulted in a “joint work.”¹⁹¹ But-for causation would elude those restrictions, converting interlopers into co-authors, or even sole authors.

One might rejoin that cabining but-for authorship to the AI context would avoid doctrinally inadmissible spillover effects in traditional authorship scenarios. That approach, however, would clash with another longstanding copyright doctrine: technological neutrality. The Copyright Act and its judicial interpretation strive to apply the same basic principles regardless of the nature of the work or its exploitation.¹⁹² But even if one advocated more technologically tailored copyright

¹⁸⁸ The limitative list does include “pictorial illustrations” that constitute a “supplementary work,” defined as “a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work.” 17 U.S.C. § 101.

¹⁸⁹ *Id.* (definition of works made for hire).

¹⁹⁰ *See, e.g., Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998); *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991).

¹⁹¹ *See, e.g., Thomson; Childress.*

¹⁹² *See, e.g.,* 17 U.S.C. §§ 101, 102, 106 (statutory definitions, subject matter, and rights, respectively). The fair use defense, however, has accommodated technologically driven exceptions. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Google LLC v. Oracle Am.*, 593 U.S. 1 (2021); *Authors Guild v. Google*, 804 F.3d 202 (2d Cir. 2015).

rules as a general proposition,¹⁹³ would but-for authorship of AI outputs be a good idea?

An obvious objection points to the breadth of the outcome: Copyright protects “expressions,” not “ideas,”¹⁹⁴ but a prompt such as “Draw me a sheep!” is an idea. With but-for authorship, the inputter of the prompt would become the author of every machine-generated implementation of the idea. That extravagant result would generate a “thick” copyright from non-copyrightable subject matter, and could stifle subsequent authorship.

One might avoid this conundrum by confining but-for authorship to prompts sufficiently elaborated to surpass the level of mere “ideas” (recognizing that the line between an idea and its expression notoriously resists definition¹⁹⁵). The prompts—commanding the machine to draw the sheep with fluffy purple curls and a diabolical face furiously butting the Little Prince on his asteroid to the gratification of his Rose—would constitute a copyrightable literary work. But-for causation would make the prompt creator the author and copyright owner of all outputs using the copyrighted prompt, despite the multiple different forms that execution might take, including outputs that “disobey” the prompts by providing content the prompts did not ask for, or by omitting “expressive elements” the prompts did request:¹⁹⁶

¹⁹³ See, e.g., Brad A. Greenberg, *Rethinking Technological Neutrality*, 100 MINN. L. REV. 1495 (2016).

¹⁹⁴ 17 U.S.C. § 102(b).

¹⁹⁵ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (“Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.”) (internal citations omitted).

¹⁹⁶ An AI system’s failures to execute some commands, as well as its deliveries of unasked-for content, furnished one reason for the Copyright Office’s conclusion that prompt entry did not “author” the uncontrolled outputs, see U.S. COPYRIGHT OFF., *supra* note 160, at 19–20.



(Top) Dall-E generated multiple variations of vicious sheep, in response to the same prompt that generated the images shown earlier in this section. (Bottom) Midjourney, in response to the same prompt, generated images of static and kindly sheep, and also added new figures.

Ruling for copyright in the results of elaborate prompts, while less overweening than propertizing the results of simple prompts, may still sweep far more broadly than the current positive law of copyright. For one thing, execution of the prompt converts a literary work into a pictorial work; the category crossover makes a difference, because the instructions may not sufficiently delimit the resulting visual output. This disjunction recalls the “indeterminate” musical compositions analyzed by Dorothy Pennington Keziah.

Indeterminate music, then, is a music of randomness, silences, and disconnected, unrelated, and often unconventional, sounds. It is a music employing new notational systems and compositional procedures that only imprecisely indicate the parameters of the tones and impose new concepts of control over the order of their appearances. Performers are free to choose their own sound-making objects (instruments or otherwise), free to use all sounds and noises as musical raw materials, free to choose which written notes they will play, free to choose one or more elements of a note

(pitch, duration, intensity), free to begin and end anywhere, free to play the score from front to back, back to front or upside down, free to use a little or a lot of the score, even free to play or not to play. Thus, performances of this music are unpredictable, each performance differing according to the extent and nature of the choices left to the performer or conductor. It is conceivable (even likely) that in some cases a work may not be recognizable as the same work in every performance.¹⁹⁷

Keziah detailed the consequences of the composer's abdication of control over the production of musical sounds:

[For] those works that carry indeterminacy to its extreme—works for which there is really no score at all but only the materials for a score, performance directions, instructions, descriptions of processes, etc.—. . . registration could be made for such works as “books,” . . . [but they] do not qualify for registration as musical compositions because they do not fix a sufficient amount of the original sound of the piece.¹⁹⁸

AI image-generation systems may play a role akin to the performers of the instructions to execute “indeterminate” musical compositions (at the extreme). The greater the performers' freedom to select and manipulate the components of the musical composition, the more attenuated the composer's claim to authorship of the *musical* expression (as opposed to the literary expression of the instructions, which, we have posited, suffice to form a literary work).

By the same token, the more the literary instructions constrain the visual output, the greater the claim that authorship of the instructions covers their execution.¹⁹⁹ And the more precise the instructions, the fewer the corresponding outputs. This specificity could assuage concerns that the author of the prompt might lay claim to too many outputs using that prompt. Shackled to a specificity requirement, a reined-in but-for causation test scarcely departs from proximate causation, which

¹⁹⁷ Keziah, *supra* note 156, at 328.

¹⁹⁸ *Id.* at 358–59.

¹⁹⁹ For example, Sol LeWitt's “wall drawings” consist of highly detailed instructions for their execution, but remain open to some interpretation by the persons carrying out the instructions. See, e.g., Holland Cotter, *Now in Residence: Walls of Luscious Austerity*, N.Y. TIMES (Dec. 4, 2008) (“Although LeWitt came up with the initial designs, his relationship to the work was otherwise hands-off. He wrote instructions for how the work should be done firm [sic] but easy-to-follow recipes with occasional sweeten-to-taste allowances but hired other artists to do it. Some he trained, with the expectation that they would train others, who would in turn train still others, stretching on through generations. To help assure smooth continuity, he devised art that didn't require virtuosic talent, just straightforward artisan skills and patient attention. If a drawing was done correctly that was enough.”).

would reassure traditional humanist copyright adherents but could frustrate advocates of a more expansive universe of copyrightable AI outputs.

One might object that category crossover should not limit the scope of the copyright in the literary work expressing the instructions: Copyright's derivative works right covers media transformations. Thus, for example, the author of a literary "treatment" detailing the plot and characters of a prospective motion picture would enjoy exclusive adaptation rights to authorize a screenplay (a "dramatic work") further developing the plot and characters, as well as the "audiovisual work" of a full motion picture based on her treatment.²⁰⁰ Indeed, the derivative works right reserves to the author an infinite number of sequels and prequels and spinoffs, including in different media (so long as they incorporate expression substantially similar to the original iteration²⁰¹).

But there is a difference between having the right to authorize or prevent the creation of derivative works based on a copyrightable underlying work and claiming copyright in an authorized derivative work that another person creates. The copyright owner of the literary work of an elaborated prompt may enjoy the exclusive right to input that precise prompt; but if her prompt produces myriad uncontrolled outputs, she cannot claim authorship of any of them. But-for advocates would object that entering the elaborated prompt supplies the requisite causal act

²⁰⁰ Film treatments are registered with the Copyright Office, *see, e.g.*, *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129 (C.D. Cal. 2001) (referencing registration numbers of several film treatments at issue; infringement not found for lack of substantial similarity of expression), as well as with the Writers Guild of America, *see, e.g.*, *DuckHole Inc. v. NBC Universal Media LLC*, 2013 U.S. Dist. LEXIS 157305 (C.D. Cal. Sept. 6, 2013) (dismissing action for lack of similarities beyond ideas and *scenes à faire*). Most claims alleging infringement of film treatments or synopses fail for lack of substantial similarity of copyright-protected elements, *see* sources cited immediately above. *But see Zervitz v. Hollywood Pictures, Inc.*, 995 F. Supp. 596 (D. Md. 1996) (denying motion for judgment notwithstanding the verdict for plaintiff in action alleging that defendant's film was based on plaintiff's synopsis of a story about an African basketball player recruited to play for an American university; the court found substantial evidence of similarity between "Recruiting" and "The Air Up There" to support jury's finding of infringement).

²⁰¹ In practice, the incorporation of the underlying work's expression in sequels, prequels and other spin-offs may be exceedingly attenuated; arguably, trademark-like protection of goodwill animates the findings of copyright infringement, *see, e.g.*, *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015) (finding infringement of the *Batmobile* "character," despite the substantial differences in the car's appearance across comic books, television series and movies).

(proximate causation requires control over the creative process, but but-for causation does not), leading to authorship of the various outputs. But even if limiting but-for claims to elaborated prompts would elude the problem of conferring rights in ideas, but-for authorship presents a different doctrinal clash: The outputs are derivative works, but, outside the AI context, the author of the underlying work is not also the author of the derivative work (unless she creates that work too). For example, Frank L. Baum, the author of the novel *The Wizard of Oz*, originally published in 1900, is not the author of the eponymous 1939 motion picture starring Judy Garland, nor of the 1975 Broadway musical *The Wiz*, nor of the 1978 motion picture version, nor of the 2003 Broadway musical *Wicked* and its 2024 motion picture adaptation, even though all of these are derivative works of the novel.

The spillover effects of a technologically neutral concept of but-for authorship would cancel or compromise the authorship claims of the actual creator of a derivative work in the offline world. The author of the underlying work might, by contract, demand a retrocession of the derivative author's copyright, or might otherwise constrain the derivative author's exercise of her copyright, but those prerogatives do not devolve upon the underlying author by operation of the copyright law.²⁰²

Moreover, the exclusive right to implement the prompted instructions would not prevent third parties from isolating the "idea" of the prompts and, eschewing the copyrightable detail, creating an independent execution, in any medium.²⁰³

²⁰² See 17 U.S.C. §103(b) ("The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material."). By the same token, the "independence" of the copyright in the derivative work means that its ownership is distinct from the ownership of the copyright in the underlying work.

²⁰³ See COMPENDIUM, *supra* note 118, at § 804.4(F)(2) ("A treatment is a written description of a dramatic work or television show, which outlines and describes the scenes and/or characters and often includes sample dialog. A treatment is generally longer and more detailed than a synopsis. A registration for a treatment extends to the text of the treatment submitted to the U.S. Copyright Office, but it does not extend to the idea, subsequent versions of the script, or a completed television series.").

Thus the scope of protection for the prompts will turn on the degree of their elaboration. Learned Hand famously opined, with respect to the copyrightability of fictional characters:

If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's "ideas" in the play. . . . It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.²⁰⁴

Outside the AI context, the description of a prospective work (e.g., an outline or treatment) must pass what I'll call the "Sir Toby Belch test" before its author may claim exclusive rights to realize the description. For AI prompts, the same rule of distinct marking should pertain; the rule, however, while consistent with the Copyright Office's position on proximate causality,²⁰⁵ would not accommodate but-for authorship. Unless, therefore, we were to rethink the idea/expression distinction (a reconsideration that would require amending the Copyright Act and would radically enlarge the scope of copyright protection to the detriment of follow-on authors), but-for authorship fails as a means to expand the universe of copyrightable AI-generated outputs.

Finally, one might inquire whether it matters that the prompt author would not enjoy a copyright in the outputs resulting from the prompt's execution. After all, if the prompt passes the Sir Toby Belch test, third parties may not copy and input the prompt to generate an image without infringing the copyright in the literary work of the prompt. But the prompt author's potential indirect rights over an output will not prevent third parties from directly copying any unprotected authorless outputs. If third parties wish to exploit a particular output, there is no need to copy the input (whose implementation in any event may not produce the same output). Given the

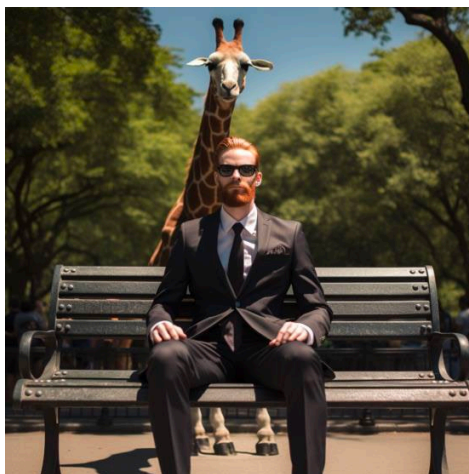
²⁰⁴ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (holding that the play *Abie's Irish Rose* and its characters were not infringed by the motion picture *The Cohens and the Kellys*).

²⁰⁵ Which the Copyright Office has recently reaffirmed, see U.S. COPYRIGHT OFF., *supra* note 160, at 18 ("Prompts essentially function as instructions that convey unprotectible ideas. While highly detailed prompts could contain the user's desired expressive elements, at present they do not control how the AI system processes them in generating the output.").

output's lack of copyright protection, third parties may exploit it regardless of any copyright in the input.

D. *Other Approaches to AI and Authorship*

A more modest approach to AI authorship quarrels with the Copyright Office's requirement of proximate and determinative human intervention, and finds sufficient human participation through "prompt engineering."²⁰⁶ Prof. Edward Lee has urged a "bare minimum" standard of creative intervention in the machine's generation of an output: "The lowest level of creativity, or bare minimum, occurs when the person uses a prompt selecting the elements for the image."²⁰⁷ Unlike the Copyright Office's approach, it apparently would not matter that the same selection could yield a vast number of outputs whose arrangement, moreover, may be unpredictable. But even were the element-selection minimally creative and non-*de minimis*, copyright would inhere in the selection and not in the elements. Thus, to use Prof. Lee's example of a giraffe standing behind a sunglasses-wearing red-bearded man sitting on a Central Park bench, his copyright would cover the appearance of those figures in that particular placement.²⁰⁸



Edward Lee, *Prompting Progress: Authorship in the Age of AI*, Image I selected from Second Set of Images produced using Midjourney, 2024.

²⁰⁶ See, e.g., Edward Lee, *Prompting Progress: Authorship in the Age of AI*, 76 FLA. L. REV. 1445, 1454 (2024).

²⁰⁷ *Id.* at 1535.

²⁰⁸ *Id.* at 1535–39.

Under the Copyright Office’s approach, Prof. Lee may be the author of the compilation of elements, but, while his prompts caused Midjourney to generate images corresponding to those elements, he is not the author of Midjourney’s depictions of the giraffe, nor of the man, nor of the bench and the surrounding park. Anyone would be free to separate and extract those images from their combined appearance in the output.

Unlike the Copyright Office’s approach, however, which would deny copyright to any particular execution of a prompt that did not control how the machine “processes [it] in generating the output,”²⁰⁹ and therefore would deny copyright to the image as a whole, a prompt-engineering approach would confer rights in one particular AI execution of the instructions when the resulting image incorporates the elements specified by the prompt, even in the absence of determinative control. In order to cabin the potential reach of the “bare minimum” standard, this prompt-engineering approach would lead to copyright coverage only of the one executed output.²¹⁰ As a result, given the “thinness” of protection, prompt engineering’s “bare minimum” standard will generate a rather whimper-ish bang for the prompt-er’s buck.

Other advocates of copyright for AI outputs have urged analogy to works made for hire.²¹¹ As we have seen, Congress has already bestowed the mantle of authorship status on non-human non-creators, because juridical persons can be employers for hire vested with the status of authors (although, as we have also seen, the genesis of juridical persons’ authorship status derived from an administrative shortcut enabling renewal of multiple-authored collective works²¹²). If we have already surmounted the human authorship hump with works for hire, then making room for machine authorship should encounter no impediment, the argument

²⁰⁹ U.S. COPYRIGHT OFF., *supra* note 160, at 18.

²¹⁰ A point Prof. Lee implicitly acknowledges. See Lee, *supra* note 206, at 1539 (“[B]ecause my input is only minimally creative in selection, analogous to a point-and-shoot photograph, the copyright for the image should be very thin, only protecting against identical copies.”).

²¹¹ See, e.g., Thaler v. Perlmutter, 687 F. Supp. 3d 140 (D.D.C. 2023) (rejecting plaintiff’s argument that he was the author of an AI-generated CGI as a work made for hire); see also Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, STAN. TECH. L. REV. 5, 26–28 (2012); Robert C. Denicola, *Ex Machina: Copyright Protection for Computer-Generated Works*, 69 RUTGERS U. L. REV. 251 (2016).

²¹² See *supra* note 139.

goes. But this argument conflates the statutory status of “authors,” “for purposes of this title,” and the statutory specification that “copyright subsists in original works of authorship.” Whether or not the work’s statutory “author” is a human being, the work must be the product of human *authorship*, otherwise there is nothing in which copyright inheres. As the federal District Court for the District of Columbia explained in *Thaler v. Perlmutter*,

The work-for-hire provisions of the Copyright Act . . . presuppose that an interest exists to be claimed. *See* 17 U.S.C. § 201(b) (“In the case of a work made for hire, the employer . . . owns all of the rights comprised in the copyright.”). Here, the image autonomously generated by plaintiff’s computer system was never eligible for copyright, so none of the doctrines invoked by plaintiff conjure up a copyright over which ownership may be claimed.²¹³

In other words, it does not follow that anyone or anything that Congress says is an “author” necessarily *creates* “an original work of authorship.” That phrase implements the constitutional subject matter of the “writings” of “authors,” which the Supreme Court has denominated “form[s] in which the ideas in the mind of the author are given visible expression.”²¹⁴ Authorship “gives expression”; it creates, not merely acquires. An employer for hire, whether a juridical or a natural person, does not itself create; the statute attributes to it the results of the authorship—i.e., the copyright—of human “employees” and of the individuals commissioned to create certain kinds of works (under certain limited conditions). The work made for hire doctrine may impose an unnatural extension of “author,” but, properly understood, it does not collapse authorship into first ownership. Without authorship, there is no copyright to own, and without human creators, there is no authorship.

Nonetheless, one might ask, what’s wrong with authorless copyright? Arguably, a machine-generated output can promote the progress of knowledge just as much as a human-produced work.²¹⁵ Indeed, the relationship between knowledge

²¹³ *Thaler*, 687 F. Supp. 3d at 150, *aff’d*, 130 F.4th 1039 (D.C. 2025). The D.C. Circuit agreed: “The word ‘authorship,’ like the word ‘author,’ refers to a human being. As a result, the human-authorship requirement necessitates that all ‘original works of authorship’ be created in the first instance by a human being, including those who make work for hire.” *Thaler*, 130 F.4th at 1051.

²¹⁴ There is an obvious anthropomorphism to this characterization (though one might retort that failure to anticipate mindless generative machines no more forecloses their inclusion than does the Court’s reference to “visible expression” precludes copyright for sound recordings).

²¹⁵ *See* Gina Kolata, *A.I. Chatbots Defeated Doctors at Diagnosing Illness*, N.Y. TIMES (Nov. 17, 2024).

promotion and copyright protection may be especially intertwined in the case of works, such as Kashtanova's *Zarya of the Dawn*, that combine authorless AI-generated elements (the individual images) with copyrightable contributions (the text of the graphic novel and the selection and arrangement of the images).

The copyright law is clear, however, that the copyright in a compilation or a derivative work does not extend to preexisting elements that the author did not create.²¹⁶ Kashtanova would not be able to bootstrap the AI-created *Zarya* visual character to her compilation copyright. Any third party, therefore, would be free as a matter of copyright law to extract the character and include her in new graphic novels, or in audiovisual works, or in merchandizing properties, such as t-shirts, throw pillows or toys.²¹⁷ Without a copyright to enforce against these potentially lucrative uses, prospective creators of hybrid AI-inclusive works might lack adequate incentives to produce them.

That outcome may seem particularly problematic when the AI-generated component does not preexist the hybrid work. Because the AI-generated component will have been born with the hybrid work, extending the copyright to cover, for example, *Zarya* will not deprive the public or other authors of the ability to adapt or compile elements previously in the public domain. Perhaps, then, an incentive argument could justify the bootstrapping of newly generated authorless elements to the copyright in a hybrid work as a whole.

On the other hand, the absence of copyright protection for the AI-generated component could encourage the author of the hybrid work to rework the under-authored element in order to furnish sufficient supplemental authorship to extend copyright coverage. For example, suppose Kashtanova revised the initial Midjourney output by hand or by using a digital tool whose outputs Kashtanova controlled. The resulting image would be a derivative work, whose copyright would be limited to the new matter Kashtanova introduced. But assuming Kashtanova did not publicly disclose the underlying AI image, no third party could copy the *Zarya* visual character without also copying the new matter, thereby infringing the copyright. By adding her personal stamp to the initial AI output, Kashtanova could succeed in claiming copyright for all the components of her graphic novel.


²¹⁶ 17 U.S.C. §103(b).

²¹⁷ See images, *infra*. Under certain circumstances, *Zarya* might be protectable as a trademark, were she recognized as an indication of source for Kashtanova's books and other products.

Similarly, even if reworking the components of an AI-generated output failed to demonstrate sufficient authorial control over each component, the overall assembly of those components would garner a copyright in the “selection, organization and arrangement” of the components into a copyrightable whole, as the Copyright Office acknowledged for *A Single Piece of American Cheese*. Where, as in that instance, the sum exceeds the value of the parts, the unavailability of copyright for the extracted parts should not undermine the incentive to create a protectable production of the whole. Thus, the human authorship requirement, rather than discouraging the creation of hybrid works, should result in more, not less, overall authorship.

For examples of the difference it makes when an AI-generated image lacks sufficient authorship in its reworking or in the particular composition of its elements, compare the exploitation of the individual image of *Zarya* with the registered image of *A Single Piece of American Cheese* in these mock Amazon.com-type pages:

zarya of the dawn
Home
About
Shop
Help
Your Cart



American Girl Zarya Collector Doll

★★★★☆ 4 Reviews






\$60

Select Model

Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut.


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The first examples (above), of *Zarya* merchandising properties would not infringe because Kashtanova’s copyright excludes the individual AI-generated images. The second set of images (below), of *American Cheese* merchandising properties, would come within the scope of the copyright that covers the entirety of the assembled image despite the lack of protection for the individual AI-generated components:

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A Single Teddy of American Cheese






★ ★ ★ ★ ☆ 4 Reviews

\$30

Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut.

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In any event, the premise that encouragement to produce authorless outputs justifies vesting them with copyright supposes that copyright concerns only the promotion of learning and ignores the constitutional means—the writings of authors—by which knowledge is to progress. Two examples show why the “Progress of Science” fails to provide an adequate basis for vesting copyright in an authorless

output.²¹⁸ First, in *Feist Publications, Inc. v. Rural Telephone Service Co.*,²¹⁹ the Supreme Court asserted that original authorship was a constitutional requirement and declined to equate informational utility with originality. As the Court observed regarding the white pages telephone book there at issue, “Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.”²²⁰ *Feist* brought up the rear of a long line of directory cases in which courts found the expenditure of effort and resources sufficient to justify the protection of works of information low on authorship but high on commercial value.²²¹ Notwithstanding this history, the Supreme Court unflinchingly interpreted the 1976 Copyright Act, and the Constitution, to require “a modicum of creativity,”²²² and thus reaffirmed authorship as the essential criterion for copyright.

Second, the well-established rule of independent generation bestows copyright on two apparently identical works, so long as one author did not copy the other.²²³ But if the second work is identical to its predecessor, or nearly so, it will add nothing to the progress of knowledge. Justification for its copyright must lie elsewhere. Holmes’ personality theory fits the bill: Copyright inheres in the expression of the author’s unique individuality. That uniqueness may mean that no two works will

²¹⁸ It is already clear that a work need not promote progress in order to qualify for copyright protection. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 197 (2003) (“[T]he preamble itself places no substantive limit on Congress’ legislative power”); *Golan v. Holder*, 565 U.S. 302, 325 (2012) (“[T]he Copyright Clause does not demand that each copyright provision, examined discretely, operate to induce new works. Rather, we explained, the Clause ‘empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.’ And those permissible ends, we held, extended beyond the creation of new works.” (first quoting *Eldred*, 537 U.S. at 222, and then citing *id.* at 205–06)).

²¹⁹ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

²²⁰ *Id.* at 362–63.

²²¹ See Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1869–70 (1990).

²²² *Feist*, 499 U.S. at 362.

²²³ See, e.g., *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (“Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an ‘author’; but if by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.”).

be truly identical; as Judge Learned Hand observed in 1921, “no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike.”²²⁴ But that divergence simply underscores why the essence of copyright is human individuality.²²⁵

CONCLUSION

In *Thaler v. Perlmutter*, the D.C. Circuit relied solely on statutory grounds to affirm the Copyright Office’s refusal to register; the court thus avoided reaching the constitutional question whether Congress could enact copyright protection for authorless outputs. By contrast, constitutional considerations informed both the District Court’s and the Copyright Office’s rulings. From *Sarony*’s broad embrace of “all forms . . . by which the ideas in the mind of the author are given visible expression,”²²⁶ these authorities derived the premise that the constitutional phrase “writings” of “authors” implies works of human intellect.²²⁷ An “author” has to have a “mind” to produce and express “ideas.”

A machine may be operated by someone with a mind; it does not have a mind of its own. Generative AI may churn out impressively author-like results, but grandiose projections notwithstanding,²²⁸ it is not sentient. If, as I have contended, the Constitution enshrines a humanistic vision of copyright, then protection of authorless outputs is not the province of copyright law. Perhaps Congress enjoys power

²²⁴ *Jewelers’ Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932, 934 (S.D.N.Y. 1921). *Sheldon v. Metro Goldwyn Pictures Corp.* is not inconsistent with *Jewelers’ Circular*: Judge Hand is not challenging authorial individuality; on the contrary, he posits that the Keats-ignorant poet will enjoy a copyright precisely because *Grecian Urn bis* will have independently (even if magically) come from him.

²²⁵ Cf. RINGER, *supra* note 5, at 19 (“at [copyright’s] root there is one beneficiary of protection and one only, and that is the independent author”).

²²⁶ *Sarony*, 111 U.S. at 58.

²²⁷ *Accord The Trade-Mark Cases*, 100 U.S. 82 (1879) (holding Congress’ power under the patent-copyright clause extended to “only such [works] as are original and are founded in the creative powers of the mind”).

²²⁸ See, e.g., Kevin Roose, *If A.I. Systems Become Conscious, Should They Have Rights?*, N.Y. TIMES (Apr. 24, 2025); see also Cade Metz, *Saying ‘Thank You’ to ChatGPT Is Costly. But Maybe It’s Worth the Price*, N.Y. TIMES (Apr. 24, 2025); Ian Shepherd, *Human Vs. Machine: Will AI Replace Content Creators?*, FORBES (Apr. 26, 2024), <https://perma.cc/D9MH-ZDZ8>; Kent F. Hubert, Kim N. Awa & Darya L. Zabelina, *The Current State of Artificial Intelligence Generative Language Models Is More Creative Than Humans on Divergent Thinking Tasks*, 14 SCI. REP. 3440 (2024).

under other heads of constitutional authority, notably the Commerce Clause,²²⁹ to devise exclusive rights in machine-generated productions.²³⁰ In that event, the justification for those rights would lie in—currently unproven—needs for incentives to produce AI outputs.²³¹

That said, not all AI outputs will lack sufficient human authorship. It may be telling that Thaler belatedly attempted to recharacterize the nature of the image “A Recent Entrance to Paradise” from one “autonomously created” by a machine to one in which the human act of providing prompts to a human-designed machine supplied the necessary authorial intervention. In shifting from absolutist assertions of machine creativity to milder pretensions of human partnership with the machine, Thaler effectively acknowledged the centrality of the human role in copyright law. The shift downgrades the debate to one about degrees of causation: but-for versus proximate. I have agreed with the Copyright Office that proximate causation best encapsulates authorship and harmonizes with other essential copyright doctrines, including the idea/expression dichotomy. But-for causation, as we have seen, clashes with several of those doctrines. Both approaches, however, recognize that an “original work of authorship” requires a human creator.

Once we understand authorship to turn on the level of human-exercised control, we can bring AI-assisted creativity within copyright’s ambit in at least two ways. On the front end, through the design of the prompts and other commands that reduce the randomness of the results. On the back end, by modifying the initial machine-generated product, including by selecting and rearranging the components of the literary, artistic or musical output. Humanist copyright welcomes human creativity in all its guises, including those that find their expression through the manipulation of digital devices and outputs.

²²⁹ U.S. CONST. art. I, § 8, cl. 2.

²³⁰ See, e.g., *The Trade-Mark Cases* (trademarks not being the “fruits of intellectual labor,” Congress’ protective power must derive from some other source of constitutional authority, potentially the clause pertaining to interstate commerce).

²³¹ See Ginsburg & Budiardjo, *supra* note 177, at 447–48 (expressing skepticism regarding a *sui generis* regime for authorless outputs).

