

Presenter



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Copyrightability of Generative AI Works

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

Facts: Burrow-Giles marketed unauthorized lithographs of Sarony's photograph of writer Oscar Wilde

Argued photography was merely a mechanical process so Sarony not an “author”

Holding: Court found that Sarony was an author because he:

- Posed Wilde in front of the camera
- Selected and arranged the costume, draperies, and other various accessories in the photo
- Arranged the subject to present graceful outlines
- Arranged and disposed of the light and shade
- Suggested and evoked the desired expression

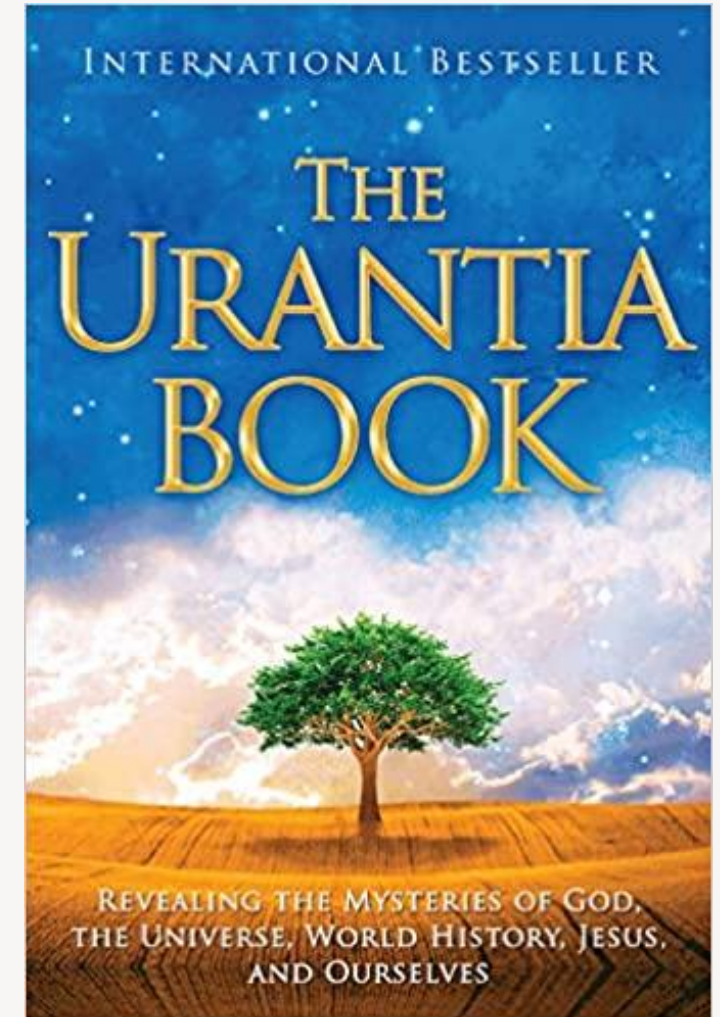
Takeaway: Court recognized that human control of a mechanical device can lead to authorship when a human is using the machine to create a work.



Urantia Found. v. Maaherra, 114 F.3d 955 (9th Cir. 1997)

“Celestial Beings” cannot be copyright owners/authors

Humans who compiled, selected, coordinated, and arranged the teachings such that the work as a whole is copyrightable can be deemed the authors.



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

Facts: PETA filed suit on behalf of a crested macaque who took a selfie with defendant's camera alleging defendant infringed on Naruto's copyright; claimed copyright on behalf of Naruto.

Holding: Court held Naruto not an "author" within the meaning of Copyright Act

- Copyright Act does not "plainly" extend the concept of authorship to animals
 - No mention of animals in Copyright Act.
- Copyright Office concluded works created by animals not entitled to copyright protection; deference to administrative agency.

Takeaway: First known decision to address non-human creation of a creative work. Decision turned on standing, not copyright law.



Registration of AI-Generated Works

- Copyright Office will not register a work that is produced entirely by AI Technology, as the work would not be the product of human authorship.
- However, works featuring AI-generated elements can be registered, so long as the use of AI-generated content is **disclosed** in the application.
- An applicant who creatively arranges the human and non-human content within a work should fill out the “Author Created” field to claim:
 - “Selection, coordination, and arrangement of [describe human-authored content] created by the author and [**describe AI content**] **generated by artificial intelligence.**”
- AI-generated portions of registered works must be **explicitly excluded**, which can be done in the “Limitation of the Claim” section of the application, in the “Other” field, under the “Material Excluded” heading.
- If AI-generated elements of content are *de minimis*, they do not need to be explicitly excluded

Does Copyright Authorship Require a Human?

US Copyright Office Guidance / 3d Compendium

(last revised March 2021)

§ 306 - The Human Authorship Requirement

- “...Office will refuse to register a claim if it determines that a human being did not create the work. ...”

§ 308 - The Originality Requirement

- “...To qualify for copyright protection, a work ... must possess “at least some minimal degree of creativity.”

§ 313.2 - Works That Lack Human Authorship

- To qualify as a work of “authorship,” work must be created by a human being.
- Copyright 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.

Copyright Office Artificial Intelligence Study

- August 30, 2023, the U.S. Copyright Office issued a [notice of inquiry \(NOI\)](#) in the *Federal Register* on copyright and artificial intelligence (AI). The Office is undertaking a study of the copyright law and policy issues raised by generative AI and is assessing whether legislative or regulatory steps are warranted. The NOI sought responses to various issues including the use of copyrighted works to train AI models, the appropriate levels of transparency and disclosure with respect to the use of copyrighted works, the legal status of AI-generated outputs, and the appropriate treatment of AI-generated outputs that mimic personal attributes of human artists.
- February 23, 2024 CO issued a letter to Congress providing updates on its investigation. First steps are to address AI to digitally replicate individuals' appearances, voices, or other aspects of their personalities.
- Second step, to be published in the summer, will address the copyrightability of works incorporating AI-generated material.
- Number of review board decisions on works created using AI..

Théâtre D'opéra Spatial

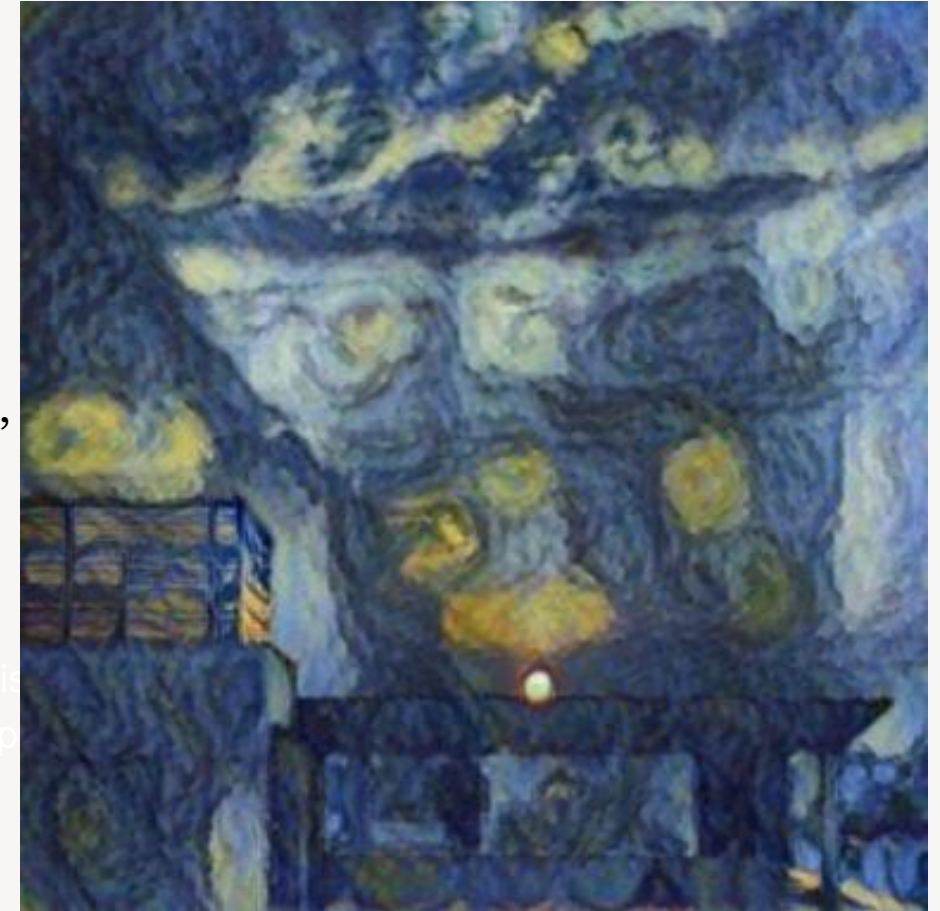


Photo from a New York Times [article](#) via Jason Allen.

- The Review Board of the United States Copyright Office (“Board”) has considered Jason M. Allen’s (“Mr. Allen”) second request for reconsideration of the Office’s refusal to register a two-dimensional artwork claim in the work titled “Théâtre D’opéra Spatial” (“Work”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration.
- The Board finds that the Work contains more than a de minimis amount of content generated by artificial intelligence (“AI”), and this content must therefore be disclaimed in an application for registration. Because Mr. Allen is unwilling to disclaim the AI-generated material, the Work cannot be registered as submitted.

Suryast (2021)

- “Suryast” is a visual artwork produced by a human artist and an “Artificial Intelligence Painting App,” called RAGHAV.
- Mr. Sahni generated the Work by taking an original photograph that he authored, inputting that photograph into RAGHAV, then inputting a copy of Vincent van Gogh’s *The Starry Night* into RAGHAV as the “style” input to be applied to the photograph, and choosing “a variable value determining the amount of style transfer.”
- US denied copyright registration three times, finding that the work “does not contain sufficient human authorship,” most recently in December 2023.
- Canada, on the other hand, granted Mr. Sahni the copyright registration, making *Suryast* the first-ever Canadian copyright registration with an AI author.
 - Human co-author listed is what made it possible.



“Suryast” a two-dimensional artwork co-authored by artist and AI “app”

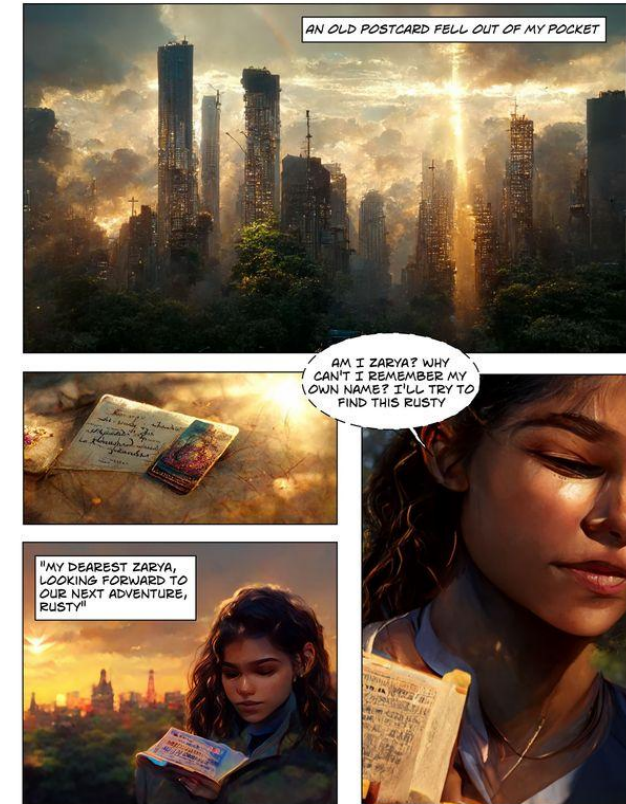
Thaler v. Perlmutter, Case No. 1:22-cv- 01564 (D.D.C.) (2022)

- Stephen Thaler, a software engineer and the CEO of Imagination Engines, Inc. asked the courts to overturn the U.S. Copyright Office’s decision to deny a copyright for artwork entitled “A Recent Entrance to Paradise.” On the copyright application, the author was listed as “Creativity Machine,” an AI software.
- Thaler argued that he could own the copyright when the computer is the artist, similar to “work for hire” contracts where a hired artist can be listed as the author while the company still owns the copyright.
- The Copyright office denied the application was because, based on the applicant’s representations in the application, the examiner found that the work contained no human authorship.
- The District Court held the Copyright Office acted properly in denying copyright registration for a work created absent any human involvement. Thaler's motion for summary judgment was denied and The Office’s cross-motion for summary judgment was granted.



Zarya of the Dawn (2023)

- Kris Kashtanova created the comic book *Zarya of the Dawn*, they wrote the text and curated the images. The work was originally granted copyright until Kashtanova’s social media showed that they used Midjourney’s AI to create the images.
- Kashtanova said they used “hundreds or thousands” of text prompts and went through “hundreds of iterations” to create their artistic vision. They said in some instances, they edited the images that Midjourney produced.
- The United States Copyright Office stated that Kashtanova “is the author of the Work’s text as well as the selection, coordination, and arrangement of the Work’s written and visual elements.” What they are not the author of is the art. They do not recognize any of the images as being owned or under Kashtanova’s copyright. In response to the edits that Kashtanova made, the Copyright Office stated that the work they did was “too minor and imperceptible to supply the necessary creativity for copyright protection.”



Rose Enigma



Photo from Kris Kashtanova's [digital portfolio](#).

- Kashtanova has a still-pending application for an image titled "Rose Enigma." The application raises the issue of whether copyright law will cover the image that originated with a copyrighted drawing by a human author but was then iterated upon with an AI tool to add color and dimensionality but otherwise retain substantial similarity of the original expression.
- USCO has yet to weigh in on the work but continues to reiterate the position that AI-developed or modified works are not eligible for protection under copyright.