



President  
**Karen Cochran**  
Shell USA, Inc.

Vice President  
**Krish Gupta**  
Dell Technologies

Treasurer  
**Daniel Enebo**  
Cargill, Incorporated

Directors  
**Steve Akerley**  
InterDigital Holdings, Inc.

**Brett Allen**  
Hewlett Packard Enterprise

**Matthew Anderson**  
Medtronic, Inc.

**Ron Antush**  
Nokia of America Corp.

**Estelle Bakun**  
Exxon Mobil Corp.

**Scott Barker**  
Micron Technology, Inc.

**Thomas Beall**  
Corning Inc

**Tyrome Brown**  
Dolby Laboratories

**John Cheek**  
Tenneco Inc.

**Tonya Combs**  
Eli Lilly and Co.

**Buckmaster de Wolf**  
General Electric Co.

**Anthony DiBartolomeo**  
SAP SE

**Robert Earle**  
Ericsson

**Matthew Fitzpatrick**  
Procter & Gamble Co

**Yen Florczak**  
3M Innovative Properties Inc.

**Louis Foreman**  
Eventys

**Scott M. Frank**  
AT&T

**Darryl P. Frickey**  
Dow Chemical Co.

**Gary C. Ganzi**  
Evoqua Water Technologies LLC

**Tanuja Garde**  
The Boeing Co.

**Mike Geise**  
General Mills, Inc.

**Robert Giles**  
Qualcomm, Inc.

**Laura Ginkel**  
Merck & Co., Inc.

**Henry Hadad**  
Bristol-Myers Squibb Co.

**Thomas R. Kingsbury**  
Bridgestone Americas Holding Co.

**Laurie Kowalsky**  
Koninklijke Philips N.V.

**Aseem Mehta**  
Bayer Intellectual Property GmbH

**Kelsey Milman**  
Caterpillar Inc.

**Jeffrey Myers**  
Apple Inc.

**Robin Nava**  
SLB

**Troy Prince**  
Raytheon Technologies

**Kaveh Rashidi-Yazd**  
Eaton Corporation

**KaRan Reed**  
BP America, Inc.

**Corey Salsberg**  
Novartis

**Paul Saraceni**  
Nike, Inc.

**Matthew Sarbararia**  
Oracle Corp.

**Derek Scott**  
Roche, Inc.

**Laura Sheridan**  
Google Inc.

**Jessica Sinnott**  
DuPont

**Thomas Smith**  
GlaxoSmithKline

**Gillian Thackray**  
Thermo Fisher Scientific

**Brian Tomko**  
Johnson & Johnson

**Phyllis Turner-Brim**  
HP Inc.

**Mark Vallone**  
IBM, Corp.

**Stuart Watt**  
Amgen, Inc.

**Bryan Zielinski**  
Pfizer Inc.

General Counsel  
**Lauren Leyden**  
Akin Gump Strauss  
Hauer & Feld LLP

Executive Director  
**Jessica K. Landacre**

October 30, 2023

Ms. Suzanne V. Wilson, General Counsel and Associate Register of Copyrights  
Ms. Maria Strong, Associate Register of Copyrights and Director of Policy and International Affairs  
United States Copyright Office  
Library of Congress  
101 Independence Ave., SE  
Washington, D.C. 20559-6000

***Re: Notice of Inquiry and Request for Comments Regarding Artificial Intelligence and Copyright; Docket No. 2023-6***

***Submitted via: Copyright.gov***

Dear Ms. Wilson and Ms. Strong:

Intellectual Property Owners Association (IPO) appreciates the opportunity to respond to the U.S. Copyright Office’s notice of inquiry and request for comments regarding artificial intelligence and copyright (“the RFC”).

IPO is an international trade association representing a “big tent” of diverse companies, law firms, service providers and individuals in all industries and fields of technology that own, or are interested in, intellectual property rights. IPO membership includes over 125 companies and spans over 30 countries. IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; supporting and advocating for diversity, equity, and inclusion in IP and innovation; and disseminating information to the public on the importance of IP rights.

IPO’s vision is the global acceleration of innovation, creativity, and investment necessary to improve lives. The Board of Directors has adopted a strategic objective to foster diverse engagement in the innovation ecosystem and to integrate diversity, equity, and inclusion in all its work to complement IPO’s mission of promoting high quality and enforceable IP rights and predictable legal systems for all industries and technologies.

IPO is pleased to respond to questions 18-21 of the RFC as follows:

***18. Under copyright law, are there circumstances when a human using a generative AI system should be considered the “author” of material produced by the system? If so, what factors are relevant to that determination? For example, is selecting what material an AI model is trained on and/or providing an iterative series of text commands or prompts sufficient to claim authorship of the resulting output?***

Yes, under copyright law, there are circumstances when a human using a generative AI system should be considered the “author” of material produced by the system. AI systems may be advanced tools, but they are still tools. While IPO agrees that an AI system (like other tools) cannot be an author, IPO believes that human authorship can exist when a human uses an AI tool as part of the creative process. Thus, the standard for human authorship should be the same as for a human using any other tool such as a camera, a word processor, a digital drawing program, etc. The question, therefore, turns on the question of what factors would be indicative of authorship in the context of a human using an AI system as a tool. As with cameras and other new technologies in the past, the law will need to be applied to a new set of facts and new case law guidance will be developed. The important thing is that the same test be applied to this new technology as has been applied to past technologies; a new or different test focused only on AI systems would be a negative development for the copyright system and would hinder, rather than promote, progress of science and useful arts.

In order to consider what factors should be relevant to determination of human authorship when AI systems are used, it is helpful to first consider the bounds of the range of possible human control of the creative process using an AI tool.

At one end is a human using an AI-enabled tool to process or enhance a work authored by that human. For example, a digital photographer may use an AI-enabled noise reduction tool to improve the visual appearance of a digital photograph. While the noise reduction tool might adjust every pixel of the photograph, there would be little question that the resulting, noise-edited work was nonetheless authored by the human photographer. Likewise, an author of a written work may use an AI-enabled grammar review tool. Regardless of the extent of the grammatical revisions, the resulting work would be considered authored by the human. In these cases, and many others like them, a human exercises creative judgement and it is that creative judgement that results in authorship of an original work.

At the other end of the range is the situation where an AI system generates a work with no creative input from a human. This could be, for example, an automated output in response to an environmental input or many other similar situations where no human judgement or creativity is present. It should be straightforward that no copyright would be available in these situations due to the absence of a human author.

What then remains is middle of this range. While the particular technology in question is new, application of copyright law to new technologies is not. Copyright law has survived the advent of many new technologies, including film camera, music recordings, digital works, and many others, by application of a consistent test as set forth in 17 USC 102(a):

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

Notably, there is no exception in the law for works of authorship produced using a particular tool (be that tool a brush, a camera, or an AI system). In IPO's opinion, the Copyright Office should treat works created using various AI systems and tools no differently than it does other technological tools long and often used by authors.

The Copyright Act protects "original works of *authorship*." 17 U.S.C. § 102(a) (emphasis added). While "authorship" is not statutorily defined, nearly a century of case law has established that "authorship" refers to qualities that are uniquely "human," often alluding to the nexus between the human mind and creative expression. Some of the earliest cases defined copyright as protecting "the fruits of intellectual labor" that are "founded in the creative powers of the mind."<sup>1</sup>

Famously, in *Burrow-Giles*, the Court wrote that an "author . . . is 'he to whom anything owes its origin, originator, maker;' . . . the nature of copyright . . . was . . . the exclusive right of a man to the production of his own genius or intellect."<sup>2</sup> The Court held that photographs amounted to copyrightable works despite issuing from a mechanical device that simply reproduced an image of what was in front of the device. The human element involved in creating the work remained critical to the Court's decision: Where the photographer produced the photograph "entirely from his own original mental conception . . . arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression . . . we think, [the] photograph to be an original work of art, of which plaintiff is the author, and of a class of inventions for which the constitution intended that congress should secure to him the exclusive right to use, publish, and sell."<sup>3</sup>

*Burrow-Giles* produced one of the Supreme Court's first interpretations of the term "writings" of "authors" in the Copyright Clause. But *Burrow-Giles* also stands out in U.S. copyright jurisprudence for its analysis of the impact of new technological modes of creation on the concept of authorship. The photographer's selection, composition, arrangement and framing are deemed to be the unique and human contributions that render photographs original works of authorship. Although the camera produces the resulting picture, authorship is rooted in the human judgement and creative decisions made behind the camera. At present, no one, including the Copyright Office, questions

---

<sup>1</sup> *Trade-Mark Cases*, 100 U.S. 82, 94 (1879); see also *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884) (agreeing with the view that authorship involves being the "cause" or "superintendent" of the work produced).

<sup>2</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884).

<sup>3</sup> *Id.* at 60.

the copyrightability of photographs, even ones taken now with fully automatic cameras or smartphones with minimal human authorship. Just as the photograph owes its origin to the photographer’s use of the camera, which gives “visible expression” to “ideas in the mind of the author,”<sup>4</sup> materials produced by generative AI systems ultimately owe their origin to the users of those systems. Putting aside the rare case where an AI system might generate its own content or output without any human involvement, the iterative series of text commands or prompts can be the unique and human contributions that render outputs of AI systems original works of authorship.

Nearly two decades later, in *Bleistein v. Donaldson Lithographic Co.*,<sup>5</sup> the Supreme Court extended the reasoning in *Burrow-Giles* about the central role of rendition, intentionality, and personality for copyright protection:

“[T]he plaintiffs’ case is not affected by the fact . . . that the pictures represent actual groups . . . [and may have been] drawn from . . . life . . . . Others are free to copy the original. They are not free to copy the copy. . . . The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity . . . and a very modest grade of art has in it something irreducible, which is one man’s alone . . . . There is no reason to doubt that these prints in their ensemble and in all their details, in their design and particular combinations of figures, lines, and colors, are the original work of the plaintiffs’ designer.”<sup>6</sup>

As in *Burrow-Giles*, creating new images based on real people in the world does not bar copyright protection. Copyright authors make “copies” of the world embodying their “personal reaction . . . upon nature,” which “always contains something unique.”<sup>7</sup> Whether the authored copy is a photograph or an illustration, if the author is reacting to the natural world and not to another copyrighted work, the copy will always contain “something irreducible, which is one man’s alone” and thus protectable as “original” under copyright law.<sup>8</sup> *Bleistein* thus extends the *Burrow-Giles* authorship/originality standard by implying that any human reaction upon nature will be original because personality is distinctive. This includes not only those intentional renditions, such as Sarony’s photographic portraits of Oscar Wilde, but arguably anything labeled “art” made by humans, such as the circus illustrations.

The *Bleistein* opinion also entrenched a minimalist approach to the originality requirement in American copyright law, construing originality either as merely the requirement that the creator was not a copier or as requiring such a minimal amount of creativity as to approach the point of vanishing. *Bleistein* became the influential and standard precedent for the proposition that originality establishes a very minimal bar for copyright protection. This standard was reinforced nearly ninety years later in the

---

<sup>4</sup> *Id.* at 58.

<sup>5</sup> *Bleistein v. Donaldson Lithographic Co.* 188 U.S. 239 (1903)

<sup>6</sup> *Id.* At 249-50.

<sup>7</sup> *Id.* At 250.

<sup>8</sup> *Id.*

seminal Supreme Court decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*,<sup>9</sup> a case that continues to define the standard of originality and authorship for copyrighted works in general and compilations in particular. It decided that as a constitutional matter, copyright protects works that possess more than a de minimis quantum of creativity:

The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. See *Harper & Row, supra*, [471 U.S.] at 547–549. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, *Copyright* §§ 2.01[A], [B] (1990). . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be.... Originality does not signify novelty; a work may be original even though it closely resembles other works, so long as the similarity is fortuitous, not the result of copying.<sup>10</sup>

“Facts do not owe their origin to an act of authorship,” because facts are discovered, not created. “Factual compilations, on the other hand, may possess the requisite originality,” because “[t]he compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers.”<sup>11</sup>

If factual compilations are protectable due to author choices in the mere selection and arrangement of preexisting data, it seems to follow that the same or higher level of authorship is achieved by an author using iterative prompts of varying degree and complexity to produce a work using an AI tool.

There appears to be a misimpression that all authors using AI systems don’t have sufficient control over the resulting work created, that prompts only “influence” what the system generates because they are “interpreted” by the AI system in comparison to its training data, and that AI systems do not interpret prompts as specific instructions to create a particular expressive result because they do not understand grammar, sentence structure, or words like humans.

IPO believes, however, that AI-assisted works are not as random, arbitrary or unpredictable as some suggest. Prompts are not so indeterminant. If a user prompts Midjourney to produce an image or series of images of a city scape under water, the user is going to get a city scape under water. The same user might iterate on dozens, even hundreds, of prompts of greater complexity and specificity before achieving a desired result, acting as the “superintendent” of the work produced.<sup>12</sup> Further, according to the

---

<sup>9</sup> *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

<sup>10</sup> *Id.* At 345.

<sup>11</sup> *Id.* At 347-48.

<sup>12</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884)

Copyright Office's guidelines, "some prompts may be sufficiently creative to be protected by copyright" as literary works. AI Registration Guidance, 88 Fed. Reg. at 16,192 n.27. IPO would suggest that it is then logical that the output of such prompts may also be sufficiently creative to be protected by copyright.

As noted above, not every output of an AI tool is an original work of human authorship. However, there certainly are outputs of AI tools that *are* original works of human authorship and to broadly exclude these works from copyright protection would be a mistake. Like all other copyright matters there is no bright line. The focus must remain, as always, on whether there is an original work of authorship. And, as noted in *Feist*, "[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.... To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice."

Without suggesting a particular test, IPO notes that creativity may be shown by one or more of a number of factors that influence the output of an AI tool. A creative choice of text prompts is not unlike "selecting and arranging the costume, draperies, and other various accessories." Selecting filters and other control functions to produce a desired character of the output is not unlike "arranging the subject so as to present graceful outlines, arranging and disposing the light and shade." Selecting a particular training data set for an AI system – which would limit and control the types of outputs produced – is not unlike "posing the said Oscar Wilde in front of the camera." Iterative actions by the human user of an AI tool may also be creative, as this winnowing process, through repetition, causes the output to increasingly conform to the author's creative judgement.

***19. Are any revisions to the Copyright Act necessary to clarify the human authorship requirement or to provide additional standards to determine when content including AI-generated material is subject to copyright protection?***

No, IPO does not believe any revisions to the Copyright Act are necessary to address these issues at the current time. It will, however, continue to analyze these issues as this area of technology continues to develop.

***20. Is legal protection for AI-generated material desirable as a policy matter? Is legal protection for AI-generated material necessary to encourage development of generative AI technologies and systems? Does existing copyright protection for computer code that operates a generative AI system provide sufficient incentives?***

The answer to this question depends on the definition of "AI-generated material." As noted in the reply to question 18, there is a wide range of possible human control over an AI system and, consequently, a wide range of types of "AI-generated material." As a policy matter, it is desirable to provide copyright protection for works resulting from a human using an AI system as a tool of creativity and where that human activity satisfies the traditional requirements of human authorship. A lack of this protection would be detrimental to rights holders and creators alike. For example, if works created by

humans using AI tools are not protected, that creates uncertainty for companies. Uncertainty leads to difficulty planning, developing, and investing, which could undermine the encouragement and promotion of arts and sciences.

***20.1. If you believe protection is desirable, should it be a form of copyright or a separate sui generis right? If the latter, in what respects should protection for AI-generated material differ from copyright?***

IPO believes copyright protection should be available for original works when the human role meets the traditional requirements for human authorship. Such authorship should not be defeated or negated simply because an AI tool is used as part of the creative process. IPO believes that copyright protection is desirable for works created using AI tools and that the current copyright system, appropriately applied as described in Question 18, suffices. Again, IPO will continue to analyze these issues as this area of technology continues to develop.

***21. Does the Copyright Clause in the U.S. Constitution permit copyright protection for AI-generated material? Would such protection “promote the progress of science and useful arts”? If so, how?***

As noted in the replies to questions 18 and 20, the answer depends on what is meant by “AI-generated material.” Where there is human creativity and originality, the Copyright Clause in no way prevents access to copyright protection merely in view of the type of tool that is used, be it a camera, a drawing program, or an AI tool. Copyright protection should be available for these works so long as the current, well-established requirements for copyright protection are met.

Thank you for considering these comments. We welcome further dialogue with the U.S. Copyright Office on this issue.

Sincerely,



Karen Cochran  
President