



MOTION PICTURE ASSOCIATION

STATEMENT OF THE MOTION PICTURE ASSOCIATION, INC.

REGARDING THE HEARING

“ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY: PART III – IP PROTECTION FOR AI-ASSISTED INVENTIONS AND CREATIVE WORKS”

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

APRIL 10, 2024

I. INTRODUCTION

The Motion Picture Association, Inc. (“MPA”)¹ appreciates the opportunity to provide this statement for the record following the Subcommittee’s April 10, 2024, hearing titled “Artificial Intelligence and Intellectual Property: Part III – IP Protection for AI-Assisted Inventions and Creative Works.” Throughout their history, the studios represented by MPA and the countless people working with them to bring the magic of moviemaking to the screen have been pioneers and beneficiaries of technological innovation. Creators are innovators by nature; they always rely on a range of tools, including technological tools, to give life to their artistic vision and to connect their works with widespread and diverse audiences. To that end, MPA’s members have invested substantially in developing themselves and supporting others who develop cutting-edge technological tools for creators to use in creating motion pictures and television programs.

In the last year and a half, advances in generative artificial intelligence have captured the world’s attention, sparking broad interest in a number of legal and policy considerations around AI, including those involving copyright. MPA’s members have a uniquely balanced perspective regarding the interplay between AI and copyright. The members’ copyrighted content is enormously popular and valuable. Strong copyright protection is the backbone of their industry. At the same time, MPA’s members have a strong interest in developing creator-driven tools,

¹ The MPA serves as the global voice and advocate of the motion picture, television, and streaming industries. It works in every corner of the globe to advance the creative industry, protect its members’ content across all screens, defend the creative and artistic freedoms of storytellers, and support innovative distribution models that expand viewing choices for audiences around the world. The MPA’s member studios are: Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc.

including AI technologies, to support the creation of world-class content. AI, like other tools, supports and enhances creativity, and draws audiences into the stories and experiences that are the hallmark of the entertainment industry.

Congress is understandably interested in assessing the current state of the law and whether changes to copyright law are necessary to address AI. To that end, the Copyright Office has undertaken a study on AI and copyright, assessing, among other things, the copyrightability of works generated using AI. As we stated in our comments submitted to the Copyright Office in late 2023, MPA’s overarching view, at this time, is that there is no need for legislation or special rules to apply copyright law in the context of AI. While AI technologies raise a host of novel questions, those questions implicate well-established copyright law doctrines and principles. At present, there is no reason to conclude that these existing doctrines and principles will be inadequate to provide courts and the Copyright Office with the tools they need to answer AI-related questions as and when they arise.

Humans are, and will remain, at the heart of the creative process. At the same time, AI, including potential uses of generative AI as it continues to develop, can be a powerful tool in the hands of human artists and those involved in creating motion pictures to enhance and serve the filmmaking process. MPA supports a robust copyright system that facilitates and provides incentives to create movies, television programs, and other art forms, including by protecting certain works that human creators make with the assistance of tools that may be considered generative AI—in the same way that such principles apply to uses of other technologies that assist creators in realizing their vision. In this statement, we summarize the appropriate standards under copyright law for assessing authorship and copyrightability, discuss the application of those standards to AI-assisted creative works, and caution against limiting the copyrightability of or imposing unnecessary and unhelpful registration requirements onto such works, advocating for a continued technology-neutral application of copyright law.

II. COPYRIGHTABILITY OF AI-ASSISTED CREATIVE WORKS

A. AI-Assisted Creative Works are Human-Authored Copyrightable Works.

AI is a tool that can, and does, assist creators in the creative process. Indeed, the very title of this hearing refers to “AI-assisted” creative works. Given that reality, creators who use AI as a tool to assist them with their creation of original expression produce *human-authored copyrightable works*.

The term “generative AI,” as is often used, may refer to numerous variations of AI technologies. Many such technologies have been in use for many years and should not raise the copyrightability and authorship questions presented by popular prompt-based tools. Unlike the use of AI systems like Midjourney, ChatGPT, etc., in which the user types words into a prompt box and the AI system produces output in the form of expressive material (e.g., an image or text), MPA’s members have long used AI as a production and post-production tool in the hands of human creators to enhance expressive material that they author. Examples include

rotoscoping,² aging and de-aging an actor, color correcting, detail sharpening, de-blurring, and removing unwanted objects.

That is not to say that prompt-based AI technologies cannot also be used as a tool to assist creators. To analyze whether a work qualifies as a work of human authorship, the Supreme Court, in *Burrow-Giles Lithographic Co. v. Sarony*, focused on how an author’s creative input and “original intellectual conceptions” contributed to the work.³ Importantly, this is a technology-neutral, fact-specific analysis that looks at the contributions of the human creator—it does not turn on whether a specific sort of technology has been employed in the creative process.

B. The Human Authorship Requirement and Copyrightability for Works Created with the Assistance of Generative AI

1. The *Sarony* decision

In *Sarony*—the Supreme Court’s seminal decision on human authorship—the Court announced the ultimate test for human authorship: whether the works in question represent the “original intellectual conceptions of the author.”⁴ The defendant argued that a photograph was not a “writing” produced by an “author,” and therefore was not within the constitutional or statutory scope of copyright protection.⁵ In particular, the defendant argued that a photograph “involve[d] no originality of thought or any novelty in the intellectual operation connected with its visible reproduction,” but instead merely “reproduc[ed], on paper ... the exact features of some natural object, or of some person” in front of the camera.⁶

The Court rejected this argument, holding that elements of the photographer’s creative process in setting up and taking the photograph showed the necessary engagement of human intellect. For example, the photographer “gave visible form” to his work “by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression.”⁷ The photographer obviously was not the “author” of the specific subjects that were reproduced on film (Oscar Wilde, his costume, the draperies, etc.), but the Court nevertheless held the work embodied protectable human creativity.

Sarony thus makes clear that the human authorship analysis will be fact-specific and will focus on the creative process underlying the work, in particular whether that process includes a human’s intellectual contributions. The photographer’s creative decisions—including posing the subject in front of the camera, arranging the setting, and controlling the lighting—satisfied the

² Rotoscoping involves manually altering individual frames within a single shot to align live-action and computer-generated images. See Avais Gilani, *Why Rotoscoping with AI Is Necessary*, MEDIUM (Sept. 19, 2023), <https://medium.com/shade-inc/why-rotoscoping-with-ai-is-necessary-be1fdb7e01c1>.

³ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (“*Sarony*”).

⁴ *Id.*

⁵ *Id.* at 56-58.

⁶ *Id.* at 56.

⁷ *Id.* at 60.

constitutional and statutory requirement of human authorship.⁸ The recent district court decision in *Thaler v. Perlmutter*—a case in which the work at issue clearly did not meet the human authorship requirement⁹—echoed this core holding of *Sarony*, explaining the “consistent understanding that human creativity is the *sine qua non* at the core of copyrightability, even as that human creativity is channeled through new tools or into new media.”

2. The Copyright Office's published registration decisions and guidance

In MPA’s comments to the Copyright Office in response to its Notice of Inquiry on copyright and AI (“NOI”),¹⁰ we discussed our concerns with several recent decisions by the Copyright Office Review Board denying registration where the applicant had employed AI tools in creating the work. In those decisions, the Office appears to have adopted an inflexible rule regarding copyrightability that focuses on the “predictability” of, and the author’s control over, the ultimate output from a creative process that involves AI, or whether the human “actually formed” the image. Such a rule deviates from the principle that the human authorship analysis is inherently a fact-specific inquiry; it also is inconsistent with the fact that a rigid appeal to predictability and control are not universally required for copyrightability. In *Sarony*, the Supreme Court focused on the human’s creative *contributions*, not on predictability and control of the results. Cases will need to be decided on their specific facts. But refocusing on the circumstances surrounding the human’s creative process (i.e., *inputs*)—rather than on the generative AI’s *output*—is the more appropriate analytical lens.

The courts and the Copyright Office have long recognized that only works reflecting human creativity are copyrightable: “courts have uniformly declined to recognize copyright in works created absent any human involvement.”¹¹ The Office’s decision denying registration in *Thaler v. Perlmutter* was straightforward and correct because the work at issue was created entirely “autonomously by machine,” and the registrant admittedly “played no role in using the AI to generate the work.”¹² *Thaler* therefore was an easy case.

Unfortunately, the Office’s recent decisions in *Zarya of the Dawn*¹³ and *Théâtre D’opéra Spatial*,¹⁴ as well as its AI Registration Guidance,¹⁵ indicate the Office may be moving toward an inflexible rule that does not properly recognize the extent to which human creativity can be present in a work generated with the use of AI tools.

Zarya of the Dawn. The Office concluded that comic book images that Kristina Kashtanova created using generative AI (prompts and resulting Midjourney images) were not

⁸ *See id.* at 58 (defining “author” as “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature”).

⁹ *Thaler v. Perlmutter*, No. 22-1564, 2023 WL 5333236, at *6 (D.D.C. Aug. 18, 2023), *appeal docketed*, No. 23-5233 (D.C. Cir. Oct. 18, 2023) (The work at issue was created entirely “autonomously by machine,” and the registrant admittedly “played no role in using the AI to generate the work.”).

¹⁰ Artificial Intelligence and Copyright, 88 Fed. Reg. 59942 (Aug. 30, 2023).

¹¹ *Thaler*, 2023 WL 5333236, at *5; *Théâtre D’opéra Spatial*, *supra* at 3.

¹² *Thaler*, 2023 WL 5333236, at *6.

¹³ *Zarya of the Dawn*, *supra* at 8.

¹⁴ *Théâtre D’opéra Spatial*, *supra* at 3.

¹⁵ AI Registration Guidance, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023).

copyrightable. Based on its understanding of Midjourney’s functions, the Office concluded that “the information in the prompt may ‘influence’ [the] generated image, but prompt text does not *dictate* a specific result.”¹⁶ The Office refused to register the work because “Midjourney users lack sufficient control over generated images to be treated as the ‘master mind’ behind them.”¹⁷ Notably, the Office indicated that Kashtanova “did not submit” the text prompts that were inputted in the application.¹⁸

Théâtre D’opéra Spatial. The Copyright Office Review Board affirmed the Office’s denial of registration for an image that Jason Allen generated with the assistance of Midjourney. Unlike in *Thaler*, where the work was entirely machine-generated, Allen claimed to have input “at least” 624 text prompts to refine the resulting image.¹⁹ The Office and the Board nevertheless concluded the work should not be registered because “Midjourney does not interpret prompts as specific instructions to create a particular expressive result.”²⁰ And “because Midjourney does not treat text prompts as direct instructions users [like Allen] may need to attempt hundreds of iterations before landing upon an image they find satisfactory.”²¹ In the Board’s view, “when 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.”²² Like Kashtanova, the Board did not have the ability to consider the prompts that Allen used: “Allen declined to disclose any specific prompt on the grounds that ‘specific string of prompts and inputs are confidential.’”²³

AI Registration Guidance. The March 2023 AI Registration Guidance explained how the Office intends to apply the human authorship requirement for AI-generated material. The Office said it would ask “whether the AI contributions are the result of ‘mechanical reproduction’ or instead of an author’s ‘own original mental conception, to which [the author] gave visible form.’”²⁴ In the Office’s view, “when 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.”²⁵ In the Office’s view, “prompts function more like instructions to a commissioned artist—they identify what the prompter wishes to have depicted, but the machine determines how those instructions are implemented in its output.”²⁶

These decisions and guidance appear to embrace a rigid and formulaic approach to the human authorship requirement for AI-generated works. As Professor Edward Lee explains, the “Copyright Office has adopted a restrictive view of authorship that requires all authors to follow a linear path in lockstep, going from conception of the entire work at time 1 to dictating the

¹⁶ *Zarya of the Dawn*, *supra* at 9 (emphasis added).

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.* at 9 n.16 (emphasis added).

¹⁹ *Théâtre D’opéra Spatial*, *supra* at 2, 6.

²⁰ *Id.* at 6 (quoting Midjourney Prompts Page, <https://docs.midjourney.com/docs/prompts> (last visited Sept. 26, 2023)).

²¹ *Id.* at 7.

²² *Id.* at 7 (citing AI Registration Guidance, 88 Fed. Reg. at 16192).

²³ *Id.* at 6 n.8.

²⁴ AI Registration Guidance, 88 Fed. Reg. at 16192 (quoting *Sarony*, 111 U.S. at 60).

²⁵ *Id.*

²⁶ *Id.*

production of the specific results at time 2, with no interplay or iterations between the two.”²⁷ Professor Lee further explains that under the Office’s “static, rigid view of authorship, creators must avoid randomness, must exercise sufficient control to dictate the specific results in the final work, and must be able to predict ahead of time, at time 1, the specific results that will be produced at time 2.”²⁸

MPA is troubled that the Office is moving toward an inflexible rule that will deny registration if human users are not able to predict and control the particular outputs that follow from prompts provided to the AI system, despite extensive human involvement in the creative process.²⁹ Even if such an approach is appropriate for some uses of prompt-based generative AI systems, the approach should not apply to MPA’s members’ use of AI as a production and post-production tool. Supreme Court precedent provides a broader conception of human authorship.

3. A limited focus on predictability and human control of the output is inconsistent with *Sarony*.

The ultimate test for human authorship is whether the work in question is an “original intellectual conception of the author.”³⁰ The Office’s reading of *Sarony* as focusing on control and predictability as measured by comparing the *output* to what the putative author intended to create³¹ takes too narrow of a view of the Supreme Court’s decision. In a fact-specific inquiry, the elements of predictability and control may be appropriate in certain cases. However, the human authorship analysis also must focus on the putative author’s creative decisions in providing the *inputs* to the process (and the content of those inputs), which may reflect the human author’s intellectual conception. To the extent that predictability and control are relevant in the context of a motion picture work, the focus must be on the overall, final motion picture work, not the intermediate material.³²

The AI Registration Guidance suggests that a human user inputting prompts—no matter the degree or volume of creativity—into a generative AI system would *never* be able to satisfy the human authorship requirement for protection of the output.³³ In reaching that conclusion, the Office relied heavily on the Compendium of U.S. Copyright Office Practices, including section

²⁷ Edward Lee, *Prompting Progress: Authorship in the Age of AI*, 76 Fl. L. Rev. 6 (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4609687.

²⁸ *See id.* at 6.

²⁹ *See id.* at 16 (“The Office staked out a higher bar of human authorship by requiring human control over the entire creative process, including the creator’s prediction of specific results ahead of time, before the final work is produced; the creator’s dictation of the specific results; and the creator’s avoidance of random elements.”).

³⁰ *Sarony*, 111 U.S. at 58.

³¹ *Id.* at 60; AI Registration Guidance, 88 Fed. Reg. at 16192; *see generally* 88 Fed. Reg. at 16192-93; *Théâtre D’opéra Spatial*, *supra*; *Zarya of the Dawn*, *supra*. Notably, the focus on predictability and control in *Sarony* appears to be driven by the fact that the work at issue was a photograph that was a near replica of the scene set out before it. The copyrightability of a photograph is not different if it involves less predictability and control, e.g., capturing a fireworks display or a war photojournalist capturing destruction and human suffering.

³² *See* AI Registration Guidance, 88 Fed. Reg. at 16192 n.25 (emphasis added) (explaining that copyrightability for AI-generated material “will depend on the circumstances, particularly how the AI tool operates and how it was used to create the *final* work”).

³³ *Id.* at 16192 (footnote omitted) (“[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.”).

312.2 (“Works That Lack Human Authorship”). Section 312.2 provides that “literary, artistic, or musical expression or *elements of selection, arrangement, etc.*” are relevant to the “traditional elements of authorship” inquiry.³⁴ However, the Office’s overly formulaic position would ignore that “expression or elements of selection, arrangement” are relevant considerations for authorship.³⁵ By categorically rejecting human authorship “when an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response,” the Office would neglect that the human authorship analysis is a fact-specific inquiry that is not susceptible to such bright-line rules.³⁶

While not, at this time, relevant to MPA’s members’ works, it seems likely that as technology continues to improve, prompts inputted into an AI system can become much more detailed.³⁷ A rule that prompts would never satisfy the human authorship requirement neglects that likely possibility. Further, focusing on predictability in outputs places undue weight on the sophistication of the particular AI model, which is unrelated to the author’s creative process.³⁸

In July 2023 testimony to the Senate Judiciary Committee’s IP Subcommittee, Professor Matthew Sag, whose research focuses on AI and copyright law, recognized that “there is no reason in principle why prompts couldn’t be detailed enough to” satisfy *Sarony*’s human authorship requirement.³⁹ Professor Sag explained that “‘creative input or intervention’ comes in many forms and the ultimate test remains whether someone’s ‘original intellectual conception’ is reflected in the final form of the work.”⁴⁰ In his view, “refining text prompts and choosing between different outputs should also be recognized as [a] way in which a human using Generative AI could meet the authorship standard.”⁴¹ This is because “[m]any types of authorship involve generating alternatives and choosing between them.”⁴²

³⁴ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (emphasis added) (quoting U.S. COPYRIGHT OFFICE, REPORT TO THE LIBRARIAN OF CONGRESS BY THE REGISTER OF COPYRIGHTS 5 (1966)) (“Similarly, 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. The crucial question is ‘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.’”).

³⁵ Lee, *supra* note 126 at 16.

³⁶ *Id.* at 21.

³⁷ *Cf. id.* at 9-10 (noting the rapid development of AI platforms with new functionalities).

³⁸ MPA understands the Office’s position that it “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.” *Zarya of the Dawn, supra* at 8 (quoting COMPENDIUM (THIRD) § 313.2). Although this position is not controversial, the danger is that the Office does not provide due weight to the context in which works are created and the numerous actions that constitute an author’s creative input, as *Sarony* requires, that are intertwined and inseparable from the final work.

³⁹ *Artificial Intelligence and Intellectual Property – Part II: Copyright and Artificial Intelligence: Hearing Before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2023) (testimony statements of Matthew Sag, Professor of Law in Artificial Intelligence, Machine Learning and Data Science, Emory University School of Law), https://www.judiciary.senate.gov/imo/media/doc/2023-07-12_pm_-_testimony_-_sag.pdf.

⁴⁰ *Id.* at 10.

⁴¹ *Id.* at 11.

⁴² *Id.*

Consistent with *Sarony*, MPA believes the authorship determination should focus broadly on the human author’s overall interaction with the process for creating the work. This directs attention to the human author’s creative process and decisions, e.g., how to arrange, select, and position elements of the ultimate work. Focusing on these creative choices ensures that copyright subsists in works that are derived from the author’s “own original mental conception, to which he gave visible form.”⁴³ The same reasoning from *Sarony* can apply to human uses of generative AI: material human creators provide to the AI tool (e.g., inputs, like a drawing or photo), refinements, direction, and then human use of the output all can involve intellectual and creative contributions that are inseparable from the ultimate work.⁴⁴ Creators can employ generative AI systems as tools to enhance the creative process, just as they have availed themselves of cameras and Adobe Photoshop and received copyright protection for their works.⁴⁵

This point is particularly important for MPA’s members’ works. Different from the creation process for other works involving literary, visual, or musical elements, the process of creating a motion picture is exceedingly complex in the number and types of creative contributions, which in many cases come from the work of thousands of individuals.⁴⁶ A major motion picture may include dozens of individuals working in writing and story; the art department; camera and electrical; stunts; sound and music; special effects and visual effects; makeup; animation; costume and wardrobe; production; editing; and more.⁴⁷ Many of the individuals working in these and other areas contribute creative elements to the ultimate motion picture. They may use AI technologies, including those that potentially fall under the Copyright Office’s broad definition of “Generative AI” (discussed in greater detail below), as a tool to enhance the expressive material they create. The resulting elements then are interwoven into a single motion picture work.⁴⁸

The fact that creators produced some parts of the film with the assistance of AI should not render those portions uncopyrightable. Such a result would be untenable. Take a hypothetical example of a superhero motion picture. The movie might be copyrighted, but would a scene involving AI-assisted visual effects depicting a battle in space receive the same protection? Can a studio protect its rights if the underlying characters and scene script are protectable, but the visual output that involves the AI-assisted effects is not?

⁴³ *Sarony*, 111 U.S. at 60.

⁴⁴ MPA understands that Kris Kashtanova has submitted a new work, “Rose Enigma,” for registration, along with an explanation of their process. This may provide the Copyright Office with an opportunity to analyze these questions in the context of 2D visual artwork. See Kris Kashtanova (@icreatelife), TWITTER (May 2, 2023, 12:03 PM), <https://twitter.com/icreatelife/status/1653475431960530944>.

⁴⁵ Courts have held that works modified using Adobe Photoshop may be copyrightable. See *etrailer Corp. v. Onyx Enters., Int’l Corp.*, No. 4:17-CV-01284, 2018 WL 746335, at *1-3 (E.D. Mo. Feb. 7, 2018); *Payton v. Defend, Inc.*, No. 15-00238, 2017 WL 6501861, at *3-4 (D. Haw. Dec. 19, 2017); AI Registration Guidance, 88 Fed. Reg. at 16193 (“For example, a visual artist who uses Adobe Photoshop to edit an image remains the author of the modified image . . .”).

⁴⁶ Stephen Follows Decoding the World Through Data, *How many people work on a Hollywood film?* (Feb. 24, 2014), <https://stephenfollows.com/how-many-people-work-on-a-hollywood-film/> (last visited Oct. 10, 2023).

⁴⁷ *Id.*

⁴⁸ Copyright law recognizes that the motion picture industry is unique in its reliance on so many different individuals and creative elements. For example, the “work made for hire” definition specifically applies to works “specially ordered or commissioned for use,” *inter alia*, “as part of a motion picture or other audiovisual work.” 17 U.S.C. § 101; see Copyright Office, Circular 30, Works Made for Hire, <https://www.copyright.gov/circs/circ30.pdf>.

More directly, attempts to disaggregate the portions of the film that were created with the assistance of AI tools from portions that were not would represent a significant departure from existing copyright law, which does not inquire into the creative process at the point of determining copyrightability. Rather, such questions are—as they should be—dealt with in the context of analyzing claims of infringement.⁴⁹

C. Copyright Registration for Works Created with the Assistance of Generative AI

MPA’s 2023 comments to the Copyright Office also expressed significant concern with the Office’s guidance on registration of works created with the assistance of AI. The Copyright Office stated in the AI Registration Guidance that “AI-generated content that is more than *de minimis* should be explicitly excluded from the application.”⁵⁰ MPA believes that (1) the Office should not require MPA’s members to disclaim aspects or portions of motion pictures that use AI as a tool in the hands of human creators, both because such aspects are copyrightable material, as well as for practical reasons; and (2) the standard for disclaimer, as it relates to purely AI-generated material, should be when the material constitutes an appreciable amount of the whole work, rather than the more than *de minimis* standard; the “appreciable amount” standard is consistent with the Compendium.

1. The Office’s broad definition of generative AI

The Copyright Office’s NOI defines “Generative AI” as: “An application of AI used to generate *outputs in the form of expressive material* such as text, images, audio, or video. Generative AI systems may take commands or instructions from a human user, which are sometimes called ‘prompts.’ Examples of generative AI systems include Midjourney, OpenAI’s ChatGPT, and Google’s Bard.”⁵¹

This broad definition, and the Copyright Office’s recent decisions involving generative AI, are susceptible of being misconstrued and do not reflect or correspond to how MPA’s members use AI technology. For the MPA’s members, AI is a tool that supports, but does not replace, the human creation of the members’ works. The members utilize AI tools primarily to save time on repetitive and detail-oriented tasks in motion picture production and post-production. The Office has not yet sufficiently distinguished between generative AI where the AI model itself creates the expressive material, on the one hand, and the use of routine post-production AI tools that could fall under the Office’s broad definition (e.g., a human post-production creator using AI as a tool to remove mud from a performer’s clothing in successive frames for a motion picture), on the other. Because the NOI’s definition on its face broadly covers any AI technology with “outputs in the form of expressive material,” there is a significant risk that policy statements intended to cover specific uses of prompt-based tools could be applied

⁴⁹ For example, the Ninth Circuit standard for substantial similarity requires the application of an extrinsic test that filters out unprotectible elements to determine if the protectible elements of two works are substantially similar. *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072, 1076-77 (9th Cir. 2006).

⁵⁰ AI Registration Guidance, 88 Fed. Reg. at 16193.

⁵¹ Artificial Intelligence and Copyright, 88 Fed. Reg. 59942, 59948-49 (Aug. 30, 2023) (emphasis added).

inappropriately to other AI technologies that are very different for purposes of the copyright analysis.

2. The Office’s registration requirements should not apply to MPA’s members’ uses of AI; applying those requirements to MPA’s members’ uses would have significant, negative real-world consequences.

Requiring the creators of motion pictures to disclaim the use of generative AI is unworkable because it is inconsistent with the copyrightability of those works, and would have significant, negative practical consequences. However, the Copyright Office’s AI Registration Guidance and the NOI’s broad definition of “Generative AI” suggest that the routine use of production and post-production AI tools could be subject to the Office’s untenable AI disclaimer requirements.

The Office’s discussions not only fail to differentiate between generative AI where the expressive material is created by the AI model, and the routine use of production and post-production AI tools that could fall under the Office’s broad definition of “Generative AI,” but even actively conflate these very different types of AI uses at times.

For example, during its June 28, 2023, webinar Registration Guidance for Works Containing AI-Generated Content, the Office provided an example of AI that removes mud from a performer’s clothing in successive frames of a motion picture.⁵² That type of AI is not generating the expressive material; rather, the AI is merely assisting with post-production enhancements to existing expressive material. While the Office stated that such use of AI did not need to be disclaimed, the rationale given was not that the AI was not “generative AI,” but that such post-production uses (like removing mud from several frames of a movie) is “de minimis,” i.e., the AI-generated elements would not have been independently copyrightable had they been performed by a human.⁵³ This raises the possibility that the use of such non-generative AI may need to be disclaimed if it were used in a way that generated copyrightable elements of the film.

In the motion picture industry, AI is more typically a component of various tools that skilled creative professionals use to enhance the filmmaking process, including during production and post-production. There should be no doubt that MPA’s members’ uses of AI in this manner do *not* render material unclaimable and thereby trigger the need to disclaim.⁵⁴

⁵² U.S. Copyright Office, *Application Process for Registration of Works with Artificial Intelligence-Generated Content*, Tr. at 7 (2003) (“June 28 Webinar Tr.”), <https://www.copyright.gov/events/ai-application-process/Registration-of-Works-with-AI-Transcript.pdf>.

⁵³ *Id.*

⁵⁴ The tools used in post-production by MPA’s members, for example, are analogous to creators using traditional Photoshop tools. This is true *even if* the tool could be characterized as “generative AI” under the Office’s broad definition. Creators’ routine use of tools that incorporate AI technology should not render parts of a motion picture uncopyrightable or trigger the need to disclaim certain elements of a motion picture in an application. These results would disincentivize creators from using helpful technological tools to effectuate their creative vision and from creating technologically advanced content that is more appealing to the public.

Additionally, requiring MPA members to disclaim such material would have significant, negative real-world consequences. There is a practical issue that any motion picture will have countless elements, including those created with the assistance of AI tools. As discussed, motion pictures often involve *thousands* of individuals working on *countless* creative elements that are all ultimately interwoven into a single motion picture work. Attempting to disaggregate and/or keep records regarding how AI is used across all of these elements creates an unwieldy and unnecessary burden. This is particularly true at the registration stage.

Further, the Office’s disclaimer requirements could also provide an avenue for copyright infringers to undercut a claim of copyright infringement by purporting to find fault in the registration process. Defendants could cause mischief by challenging the validity of registrations on the ground that the applications improperly failed to disclaim AI-generated material, even where that AI-generated material clearly reflects the creative intent of a human artist. This includes expanding the use of § 411(b)(2) referrals,⁵⁵ which complicate and frustrate civil enforcement actions.

3. The need to adhere to the Compendium’s “appreciable portion of the work as a whole” standard for purely AI-generated material

Consistent with the Compendium’s guidance, MPA believes that the Copyright Office should apply the “appreciable portion of the work as a whole” standard for disclaiming of AI-generated material rather than the unmoored “more than *de minimis*” (or *Feist* copyrightability) standard, which poses significant issues for MPA’s members.

The more-than-*de-minimis* standard articulated in the Office’s AI Registration Guidance is unclear and difficult to apply. Notably, during the June 28 webinar, the Office stated that material would need to be disclaimed if “standing on its own [it would] be sufficient to satisfy the *Feist* copyrightability standard if it had been created by a human author.”⁵⁶ If a set designer included an AI-generated painting in the background of a scene, the painting would be a work that, standing on its own, would meet the *Feist* standard of “at least some minimal degree of creativity,” but its use in the background of a scene for a matter of seconds during a two-hour-long motion picture also would be *de minimis*.⁵⁷ Requiring disclaimers for the presence of more than *de minimis* AI-generated content is not only confusing and difficult to apply, but potentially will result in significant changes to the registration process as well. Among other things, that process would inquire into the details of the author’s creative process, usurp the role of the courts in determining questions of copyrightability, and require a different standard for works that incorporate the use of AI than exists for other creative works.

⁵⁵ 17 U.S.C. § 411(b)(2).

⁵⁶ June 28 Webinar Tr. at 2 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)).

⁵⁷ There are many similar examples: (1) a short commercial “jingle” on a TV playing in a scene of a motion picture; (2) the cover of a scientific textbook that is visible in the background of a scene from a motion picture involving an education setting; or (3) actors playing a board game created for purpose of the motion picture. The jingle, textbook, and board game all could be standalone works, but none constitutes an appreciable amount of the work as a whole. If such elements were licensed for use in the motion picture, the Office would not require that they be disclaimed. The standard should not be different simply because AI might be involved.

The Compendium makes clear that the “appreciable portion of the work as a whole” standard is the correct and applicable standard for disclaimer.⁵⁸ The current version of the Compendium⁵⁹ provides guidance regarding registration of copyrighted works in accordance with U.S. copyright law.⁶⁰ Section 621.2 instructs that “[u]nclaimable material should be disclaimed only if it represents an *appreciable portion of the work as a whole.*”⁶¹ and no compelling policy reason has been articulated for adopting a stricter standard for what must be disclaimed when material is the result of generative AI than for other unclaimable material that may be incorporated into a work.

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MPA thanks the Subcommittee for its attention to these important issues and looks forward to providing further input and engaging with Congress as it continues to explore the legal and policy issues surrounding copyright and AI.

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⁵⁸ As *Feist* noted, the test of whether a work shows more than a *de minimis* amount of creativity erects a low bar to copyrightability. 499 U.S. at 363. In contrast, the test of whether material constitutes an “appreciable amount” of a work sets a higher bar. In the Second Edition of the Compendium, the Office used “substantial amount” instead of “appreciable amount,” and required an application to disclaim if the new work contained “substantial amounts of previously registered, previously published, or public domain material.” See U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 626.02 (2d ed. 1988). The Compendium defined “substantial” to mean that the preexisting material represents, “in relation to the work as a whole,” a “significant portion of the work.” *Id.* § 325.01(B). The Office has stated that the appreciable amount standard is equivalent to the substantial amount standard. Compendium of U.S. Copyright Office Practices, 82 Fed. Reg. 45625, 45626 & n.2 (Sept. 29, 2017).

⁵⁹ “The *Compendium* documents and explains the many technical requirements, regulations, and legal interpretations of the U.S. Copyright Office.” COMPENDIUM (THIRD) at 1. The Compendium “provides guidance regarding the contents and scope of particular registrations and records” and “explain[s] the legal rationale and determinations of the Copyright Office, where applicable, including circumstances where there is no controlling judicial authority.” *Id.* at 1-2. Courts hearing copyright cases, including the Supreme Court and the Ninth Circuit, have routinely “drawn upon the Compendium for guidance.” See, e.g., *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 422 (2017); *Gray v. Hudson*, 28 F.4th 87, 100 n.8 (9th Cir. 2022); see also COMPENDIUM (THIRD) at 2 (collecting cases).

⁶⁰ COMPENDIUM (THIRD) § 303.

⁶¹ *Id.* § 621.2 (emphasis added).