POSTHUMAN COPYRIGHT: AI, COPYRIGHT, AND LEGITIMACY

Matt Blaszczyk[*]

ABSTRACT

Copyright's human authorship requirement is an institutional attempt to assert legal and sociological legitimacy at a time of legitimacy crisis. Recently defended by the U.S. Copyright Office and the so-called copyright humanists, the requirement is portrayed as a beacon of copyright's faith, meant to protect human authors in the posthuman era.

The minimal threshold for human authorship, however, forces us to question whether it is merely rhetoric, which the law has always employed regardless of its justification. This Article bridges the gap between doctrinal, theoretical, socio-legal and constitutionalist scholarship, arguing that human authorship is an ideology to which the law is only nominally faithful.

The Article analyzes the U.S. Copyright Office's pronouncements, the D.C. Circuit ruling in Thaler v. Perlmutter, and the pending case of Allen v. Perlmutter, arguing that the Office's approach, despite its rhetoric, is not meant to meaningfully stop the AI revolution. Whether interpreted broadly or narrowly, the human authorship requirement is unlikely to protect the interests of human authors in the AI era.

Incorporating insights from copyright history and theoretical debates about romantic authorship, this Article argues that copyright has failed to protect those interests for over a century, instead favoring the interests of powerful corporations. If and when copyright becomes a regime for robots, the question is whether that expansion will also primarily benefit corporations. Arguably, copyright has never cared much for human authors – and it is time to question if we should keep pretending otherwise.

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[*] Research Fellow in Law and Mobility, University of Michigan Law School.

INTRODUCTION

Copyright's legitimacy is in crisis. While the law has been searching for a theoretical justification since its inception, the different philosophies have often come to be reduced to mere rhetorical strategies

pursued by lawyers, lobbyists, and the law's institutions.[1] Leading scholars compare copyright's theories, including utilitarian "creative incentives" theory, to articles of faith – with murky constitutional groundings, ideological priors, and inability to either confront scientific scrutiny or explain the modern doctrine.[2] Instead, the words which have come to describe scholarly and public perceptions of copyright doctrine are "crisis," "lobbying," "war," and "illegitimacy."[3] Some call copyright a "bloated, punitive legal regime,"[4] a system for the "idle rich," failing its "essential purpose" of benefiting authors.[5] Instead, to many scholars and a segment of the public, it appears that copyright is shaped by "powerful distributors and their lobbyists," who wish to extend the monopoly regime and extract high prices from the public, while "simultaneously depriving authors of as much money as possible."[6] Mainstream scholarship describes copyright an "engine of inequality,"[7] finds that "greed" has led to copyright's reputational downfall[8] – that is a public perception of IP as a regime of rent-seeking conglomerates,[9] culminating in "marked erosion" of copyright's sociological and moral legitimacy.[10] Some have argued that copyright – as a system of rights serving the public interest – is "dead."[11]

Copyright's crisis can be divided into three distinct layers: *legal*, *moral*, and *sociological* or *popular* legitimacy.[12] The legal doctrine has

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[1] *See generally* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

[2] *See* JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 236 (2008).

[3] Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2189 (2000) ("Words like crisis, breakdown, overload pepper our work."); Paul Edward Gellar, *Beyond the Copyright Crisis: Principles for Change*, 55 J. COPYRIGHT SOC'Y 165, 166 (2008) ("Copyright law is in crisis… it has become more and more complicated and less and less reliable, while losing legitimacy."); PETER DECHERNY, HOLLYWOOD'S COPYRIGHT WARS, FROM EDISON TO THE INTERNET (2012).

[4] *See* WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS (2009).

[5] William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 909 (1997).

[6] *Id.*

[7] DAVID BELLOS & ALEXANRE MONTAGU, WHO OWNS THIS SENTENCE? 22 (2024).

[8] *See* Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 61 (2002).

[9] *See* Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 945 (2004) ("Although the industry has repeatedly extolled the benefits of strong copyright protection and how such protection can induce artists to create…the industry's rhetoric was lost on most consumers.").

[10] Jessica D. Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 15-16 (2010).

[11] Glynn S. Lunney Jr, *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 814 (2001).

[12] *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21 (2018) (offering the tripartite typology and defining "sociological legitimacy" as involving "prevailing public attitudes toward governments, institutions, or decisions" and depending on "what factually is the case about how people think or respond.");

been characterized by internal contradictions: minimalist concepts and principles of aesthetic and technological neutrality have allowed to exclude forms of collective and traditional creativity, while protecting utilitarian works of software developers.[13] The widely-accepted justification for copyright – providing incentives for authorial creativity – has been empirically put into doubt time and again. Emerging technologies push the envelope even further by undermining the structural assumptions that there is an author who deserves a right in the resulting work, and that there is a market failure which the law is to solve. Together with artificial intelligence (AI) becoming ubiquitous, the works produced with the technology may also seem less connected to the human author. Simultaneously, their production, in principle, costs next to nothing, and the same goes for distribution over the internet.[14] If copyright is at the juncture of cheap creativity and authorless works, then the doctrinal concepts necessary to determine ownership, and justifications the Constitution and theory provided for copyrights' existence, are put into doubt.[15] This leads to a pervasive anxiety over stability, roots, and availability of title, both in AI-assisted production and elsewhere. Further yet, while the framework makes less and less sense, its uneasy interaction with tangible property and the First Amendment becomes even more tenuous.[16]

Legitimacy and the Constitution, 118 HARV. L. REV. 1787, 1795 (2005); *see also* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1014 (2007) ("Sociological legitimacy is achieved by an opinion that secures public acceptance of the Court's rulings").

[13] *See* Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 188 (2000); Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 LAW & LITERATURE 20, 29 (2013) ("[N]ondiscrimination is a fundamental principle of modern copyright law: courts are not supposed to be art critics.").

[14] *See* Dan L. Burk, *Cheap Creativity and What It Will Do*, 57 GA. L. REV. 1669 (2023); Mark A. Lemley, *IP in A World Without Scarcity*, 90 N.Y.U. L. REV. 460 (2015); *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328 (2015).

[15] Mark A. Lemley, *How Generative AI Turns Copyright Upside Down*, 25 COLUM. SCI. & TECH. L. REV. 190, 196 (2024) ("AI…turns copyright law upside down."); Carys J. Craig, *The AI-Copyright Trap*, 100 CHI.-KENT L. REV. (forthcoming 2025), at *1 https://ssrn.com/abstract=4905118 ("Copyright…has been launched into a fresh existential crisis the likes of which we haven't seen since the arrival of the World Wide Web"); Micaela Mantegna, *ARTificial: Why Copyright Is Not the Right Policy Tool to Deal with Generative AI*, 133 YALE L.J.F. 1126, 1141 (2024) ("[C]opyright principles might not be reconcilable with the challenges posed by [AI] without having to twist their long-standing definition and interpretation in a forceful way."); Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. PITT. L. REV. 1185, 1224 (1986) ("If there is no human author of such a work, how can any human be motivated to create it?").

[16] *See* Jane C. Ginsburg & Luke A. Budiardjo, *Authors and Machines*, 34 BERKELEY TECH. L. J. 343, 345 (2019) (writing that AI "exacerbates the anxiety of authorship"); *see also* Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601 (1998) (describing the evolution of property talk in relation to similar anxieties in the time of Blackstone).

Moreover, the debate regarding moral justifications of copyright usually is rather unsatisfying, with a widespread perception of copyright's normative theories being trite, self-contradictory, outdated, and not accounting for the reality in which corporations and publishers grow stronger economically with each technological and regulatory change.[17] While all theories emphasize the relationship between public welfare and author rights, the simplified readings of utilitarian or deontological philosophers usually account neither for the disfigured role authors play in copyright's landscape today, reflect seriously on what welfare or progress may mean, or study biases, distributive effects, and other critical concepts.[18] In the AI era, these tensions are not only reinforced: application of theories to AI-assisted works borders on unintelligible or on a just-so application. Worst of all, the case for other types of works has not been much easier, either.[19]

Lastly, copyright's popularity has also taken a hit in the last several decades. Copyright has come to be seen as illegitimate by the society, in part due to the perceived intermediaries' ability to influence the increasingly extensive and convoluted doctrine, and reap most of the benefits.[20] Unsurprisingly, the public has long been at the brink of withdrawing support from copyright, whether through political process, or non-compliance with the law it no longer considers just.[21] Cynical (or, at best, indifferent) attitudes towards copyright are widespread: they render enforcement difficult and reduce copyright's image to a coercive command of the sovereign, rather than a foundation of liberal democracy and individual dignity.[22] This has led both to the proliferation of infringing activities on the internet and aggressive litigation and regulatory strategies combating them.[23] Not only is fear an unstable ground for the law's enforceability,[24] undermines the incentive and authors' rights theories legitimizing the law morally,[25] it also threatens continued support for the institutions once they are in jeopardy.

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[17] *See* William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 174-76 (Stephen R. Munzer, ed., 2001); *cf.* Patrick Goold & David A. Simon, *IP's Pluralism Puzzle*, _ TEX. L. REV. __ (forthcoming 2025).

[18] Litman, *supra* note 10, at 17 ("The widespread perception of the current copyright system as illegitimate should be unsurprising."); Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87 (2004) (arguing the 1976 Act abandoned the copyright-as-property framework); *see also* Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278 (2004).

[19] Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

[20] Litman, *supra* note 10, at 17.

[21] *Id.* at 17-18.

[22] *See id.* at 18.

[23] Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 331 (2003).

[24] *See id.* at 437-443.

[25] Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1777 (2012) ("Incentives—the underpinning of intellectual property—work only if they

The crisis of copyright's legitimacy has recently been followed by cracks in its institutional structure. Billionaires are proposing copyright's abolition,[26] the independence of the U.S. Copyright Office has been undermined following the constitutionally dubious firing of Register Perlmutter,[27] while both the courts exercising copyright law and the wider liberal framework which intertwines with it are under pressure. The matters are not helped by the controversies in which the fundamentals of copyright doctrine continue to be shrouded: after years of debates, the *Copyright Restatement* has recently come to be approved with several of its key advisors resigning, indicating that attempts at providing copyright with coherence and legitimacy prove equally needed as controversial.[28] Without legal stability, popular and moral appeal, the future of copyright is uncertain, while AI production floods us all the more.

Enter *copyright humanism*: a discursive strategy of salvaging copyright's legal, moral, and sociological legitimacy, and strengthening copyright institutions, through a rhetoric which centers around human authors, quite irrespective of the fact that the legal doctrine cannot deliver the embellished promises. Copyright humanism has been recently at the forefront of the USCO efforts. The Office has asserted the *requirement of human authorship*, and won *Thaler v. Perlmutter*,[29] the case in which was challenged. The D.C. Circuit's opinion repeats the rhetoric extolling human authors and betrays its emptiness: works generated "by or with" AI may well be copyrightable,[30] and there is nothing anti-humanist about corporate authorship and ownership of copyrights.[31]

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motivate authors and inventors to create (or indirectly stimulate others, like firms, to encourage them to create").

[26] Anthony Ha, *Jack Dorsey and Elon Musk would like to 'delete all IP law'*, TECHCRUNCH (Apr. 13, 2025, 8:12 AM), https://techcrunch.com/2025/04/13/jack-dorsey-and-elon-musk-would-like-to-delete-all-ip-law.

[27] *See* Compl. Perlmutter v. Blanche, 1:25-cv-01659 (D.D.C., May 22, 2025); Tina Nguyen, *Elon Musk's Apparent Power Play at the Copyright Office Completely Backfired*, THE VERGE (May 14, 2025, 4:02 PM), https://www.theverge.com/politics/666179/maga-elon-musk-sacks-copyright-office-perlmutter.

[28] *See* Kevin Madigan, *Mounting Resignations Call into Question Legitimacy of ALI Copyright Restatement*, COPYRIGHT ALLIANCE (June 3, 2025), https://copyrightalliance.org/question-legitimacy-of-ali-copyright-restatement.

[29] 130 F.4th 1039 (D.C. Cir. 2025).

[30] *Id.* at 1049.

[31] *Compare* 130 F.4th at 1045 (D.C. Cir. 2025) ("Authors are at the center of the Copyright Act.") *and* Jane C. Ginsburg, *Humanist Copyright*, 6 J. FREE SPEECH L. 91, 167 (2025) ("*Thaler* effectively acknowledged the centrality of the human role in copyright law") *with* Jessica Litman, *What We Don't See When We See Copyright as Property*, 77 CAMB. L. J. 536, 536 (2018) ("For all of the rhetoric about the central place of authors in the copyright scheme, our copyright laws in fact give them little power and less money. Intermediaries own the copyrights, and are able to structure licenses so as to maximise their own revenue while shrinking their pay-outs to authors.").

Similarly, eminent scholars defending the requirement of human authorship – such as Jane Ginsburg[32] and Daniel Gervais[33] – simultaneously defend a thin requirement of human authorship, at times fighting the strawman of the machine author, to portray human authorship and human progress as copyright's normative lodestar, inspired by Renaissance philosophers, and embodying principles of natural rights.[34] These efforts concentrate on seeking normative coherence and justification of a system which has been in a "discernible legitimacy crisis" at least since the beginning of the century.[35] This is not exactly a new strategy, either: we are in the era of the romantic authorship ideology 2.0., a recurrent institutional strategy of using authorial symbolism to seek justification, while depleting the form of substance.[36] For all the humanist big talk, human authorship traditionally understood withers away – if it ever reigned at all.[37]

Meanwhile, the USCO proclaims that in recognizing the requirement of human authorship, it ensures that "[h]uman creativity still matters, legally."[38] The Office's publications claim that "society would be poorer if the sparks of human creativity become fewer or dimmer," which would be the case if AI-generated works were protected, affecting the authors ability to "make a living from their craft," but also making it "harder to find inspiring or enlightening content."[39] Further, protection of AI-generated works would "undermine rather than advance the goals of the copyright system" both economically and conceptually, since "the incentives authorized by the Copyright Clause are…provided to *human*

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[32] *See* Ginsburg, *supra* note 31; Ginsburg & Budiardjo, *supra* note 16.

[33] *See* Daniel J. Gervais, *The Machine as Author*, 105 IOWA L. REV. 2053 (2020); *Second-Degree Intellectual Property*, 39 BERKELEY TECH. L.J. 1091 (2024).

[34] *See* Gervais, *Second-Degree*, *supra* note 33, at 1108 (defining copyright's "normative lodestar: human progress").

[35] Shyamkrishna Balganesh, *The Institutionalist Turn in Copyright*, 2021 SUP. CT. REV. 417, 467 (2021) (adding that copyright has come to be seen as a "mechanism of rent-seeking for special interest groups" structured as "controlling the public's access to–and use of–original expression").

[36] *See* JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996); *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1461 (1992); *cf.* Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997) (reviewing BOYLE); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008); OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790-1909 (2016).

[37] *See* Bracha, *supra* note 36; BRACHA, *supra* note 36; Lemley, *supra* note 36.

[38] Miriam Lord, *US Copyright Office on AI: Human Creativity Still Matters, Legally*, WIPO MAGAZINE (Apr. 24, 2025), https://www.wipo.int/web/wipo-magazine/articles/us-copyright-office-on-ai-human-creativity-still-matters-legally-73696.

[39] U.S. COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE, PART 2: COPYRIGHTABILITY 36-7 (2025) [hereinafter USCO, COPYRIGHTABILITY]

authors as the means to promote progress."[40] A recent report concludes by invoking the American community, Constitution's intellectual property (IP) clause,[41] and a civilizing mission realized through copyright. The U.S. "is bound by *our* own Constitution and copyright principles *we* should not abandon or distort because other countries may not share them. Rather, *we* should make a persuasive case that a human-centered approach is good policy and inherent to copyright."[42] Underlining institutional resilience, symbiotic relationship with technology, doctrine's adequacy, and paramount importance to the people, copyright law and the Office set out to redeem the world and humanism in the posthuman era.[43]

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This Article argues that the USCO and the courts have recognized the requirement of human authorship and couched it in humanist rhetoric to preserve copyright's legitimacy at a time of crisis, thus strengthening the institutional actors: the Office, the courts, and rightsholders. Because of copyrightability threshold being so low, the law's one hundred years of recognizing and preferencing corporate authorship, distributions benefitting intermediaries, and the unstoppable technological change which pulls apart the long-contested symbol of the genius author, the requirement of human authorship is becoming a mere formality. Despite the wishful phraseology, copyright does not promote truly creative works nor does it get human authors paid – in the AI era or before.[44] The Article examines carefully the institutional and scholarly humanist narratives, asking if its unfortunate effect is not to provide a fig leaf for the status quo, and hide both corporate and robotic authorship.[45] This Article argues that for copyright to be truly humanist, the law should refocus the doctrine and economic distributions on human, rather than corporate authors, adjust to new technological landscape, and reflect on its own purpose and efficacy.

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[40] *Id.*

[41] *See* U.S. Const. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

[42] USCO, COPYRIGHTABILITY, *supra* note 39, at 39 (emphasis added).

[43] *Id.*

[44] *See* Craig, *supra* note 15, at *5; Oren Bracha, *The Work of Copyright in the Age of Machine Production*, 38 HARV. J.L. & TECH. 171, 171 (2024) (calling copyright a "misguided vehicle for addressing larger cultural anxieties about 'machine creativity'"); *Generating Derivatives: AI and Copyright's Most Troublesome Right*, 25 N.C. J. L. & TECH. 345, 398 (2024) ("[B]roader cultural policy concerns should be addressed outside of copyright"); Blake E. Reid, *What Copyright Can't Do*, 52 PEPP. L. REV. 519, 520 (2025) ("[S]ubsidizing creation and supporting creator welfare…depends on interventions from outside copyright law").

[45] *See* Bracha, *supra* note 36, at 266 (writing that "[a]uthorship" is an "ideology" both as a "conceptual scheme" to understand the world and as a "motivated mystification," a "false consciousness" diverging from the reality of creative process and copyright's own arrangements).

The argument proceeds as follows. Part I introduces readers to the copyrightability doctrines of originality, authorship, and the underlying idea-expression dichotomy. It explains the divergences between their rhetorical content, which emphasizes creativity, lending moral legitimacy to owners' rights, and substantive content which allows to appropriate almost anything of value.[46] It shows that established principles do not yield easy answers regarding protectability of works stemming from the use of AI, that non-humans such as corporations have long been recognized as authors, and finally, that principles of neutrality undermine attempts to exclude AI-assisted works from protection. This sets the scene for Part II's analysis of the requirement of human authorship: while a narrow requirement of human authorship is legally sound, ironically, copyright's very principles render it an ineffective tool to protect human authors in the AI era.

Part II deconstructs Office's requirement of human authorship, the grounds on which it rests, and argues that contrary to popular belief, copyright will end up protecting most AI-aided works. While the mantra that authors are humans are not machines is agreeable enough, the broader attempt to exclude any AI-aided works is self-contradictory and as the Office's own economists admit, unenforceable.[47] It goes beyond the Office's previous administration's position,[48] and appears to read a lot into a vacuous concept of authorship (as opposed to originality).[49] Part II demonstrates these tensions by analyzing two key cases – *Thaler* and *Allen v. Perlmutter*[50] – taking apart the doctrine, the theoretical and political stakes behind the litigation, and analyzing the rhetoric of each of the texts. In doing so, the Article combines traditional legal analysis with socio-legal methods, borrowing from critical discourse analysis,[51] critical

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[46] *See* Jessica D. Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 240 (1991) (arguing that public perception of copyright differs from the actual law); *see also* Kevin Gray, *Property in Thin Air*, 50 CAMBRIDGE L.J. 252, 305 (1991) ("'Property' remains ultimately an emotive phrase in search of a meaning.").

[47] IDENTIFYING THE ECONOMIC IMPLICATIONS OF ARTIFICIAL INTELLIGENCE FOR COPYRIGHT POLICY: CONTEXT AND DIRECTION FOR ECONOMIC RESEARCH, U.S. COPYRIGHT OFF. 8 (Brent A. Lutes, ed., 2025) [hereinafter USCO ECONOMISTS]

[48] Maria A. Pallante, *From Monkey Selfies to Open Source: The Essential Interplay of Creative Culture, Technology, Copyright Office Practice, and the Law*, 12 WASH. J. L. TECH. & ARTS 123, 143 (2017) ("innovation thrives on creative expression–whether or not that is reserved to the human race").

[49] Until recently, copyright humanists thought so, too. *Compare* Ginsburg, *supra* note 31, at 167 *with* Ginsburg & Budiardjo, *supra* note 16, at 434 ("These works are authorless because of the lack of any author, not because their authors are machines. Therefore, the existence of a human authorship requirement…is irrelevant to the inquiry").

[50] Complaint, 24-cv-02665 (D. Col., Sep. 26, 2024) [hereinafter *Allen*, Complaint]

[51] *See generally* NORMAN FAIRCLOUGH, CRITICAL DISCOURSE ANALYSIS (2013).

property studies,[52] and the work on the law's expressive function.[53] It argues the Office and the courts, while making minimalist pronouncements, clothe them in a carefully selected legitimacy seeking rhetoric, meant to strengthen them institutionally.

Part III argues that the fig leaf of human authorship is an institutional response to the copyright's legal, moral, and sociological legitimacy crises, the anxiety over copyright's foundations, and the strength of its institutions. The requirement of human authorship attempts to rescue copyright's coherence, repair the law's popular image, use humanist origin stories to yield moral legitimacy to rightsholders' claims, and strengthen copyright institutions, including the USCO and the courts. This argument builds on several strands of literature: copyright's own discourse on the ideology of romantic authorship and the law's rhetoric, socio-legal literature examining copyright's discourse and popular reception, and recent work in constitutional law, which highlights the importance of sociological legitimacy and institutionalist strategies.[54]

Finally, Part IV goes beyond the diagnostic and argues for a reformist humanism. If the recent turn in the discourse is to claim centrality of human authors for the sake of legal, moral, and sociological legitimacy, then humanism should not be in name only. Copyright law must start to promote human creativity and help artists, rather than be a tool of capital, if we are to take its humanist rhetoric seriously. Instead of a formalist rejection of AI assisted works, which rings hollow, copyright should be willing to take up a truly humanist set of goals and answer difficult questions regarding its efficacy in promoting them for the last one hundred years.

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[52] *See* Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 342 (1998); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 688, 692 (1985); *see also* David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 661 (2010) ("[R]hetoric represents not only a way of understanding the world; it is a form of reasoning with constitutive force because it has the potential to construct the way we think about the world.").

[53] *See* Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208, 212 (2002); Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

[54] *See* Rachel Bayefsky, *Judicial Institutionalism*, 109 CORNELL L. REV. 1297, 1380 (2024); Balganesh, *supra* note 35.

PART I. NOMINAL HUMANISM IN COPYRIGHT DOCTRINE

The question of protectability of AI-aided works depends on whether they are original works of authorship fixed in a tangible medium. The following sections show that the doctrinal concepts of copyrightability are couched in an anthropocentric language, making clear that works *without a human author* or ones which are *unoriginal* are unprotectable.[55] At the same time, the substantive requirements are so low, conceptually imprecise, and mediated by the principles of aesthetic neutrality and a practice of following commercial expediency, that it is unclear how much human input there must be for a work to be protectable. Further, for all of the creativity language, the law has protected works which are banal, sell well, and those which are authored by non-humans – corporations. For at least a century, corporations have been the most important authors and proprietors, despite the tensions with the doctrinal Blackacre. Collective creativity, works of minority and postmodern artists, and contributions of those without the final say over the product have all been legally disfavored. In short, copyright doctrine is full of tensions and contradictions, offers few easy answers, and may not help the cause of human authorship in the AI era despite the law's overt symbols.

A. Originality

Copyright protection subsists in "original works of authorship fixed in any tangible medium of expression," from which they can be "perceived, reproduced, or otherwise communicated."[56] Works, which are to be distinguished from material objects which embody them,[57] fall into categories of subject matter such as literary, musical, or dramatic works.[58] The law protects only original authorial expression, but does not extend to an "idea, procedure, process, system, method of operation,

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[55] *See* Matt Blaszczyk, *Impossibility of Emergent Works' Protection in U.S. and EU Copyright Law*, 25 N.C. J.L. & TECH. 1 (2023); Haochen Sun, *Redesigning Copyright Protection in the Era of Artificial Intelligence*, 107 IOWA L. REV. 1213, 1227 (2022); Henry H. Perritt, Jr., *Copyright for Robots?*, 57 IND. L. REV. 139, 183 (2023) ("Much of the authority accepts…that the output of generative AI… may be authorless–not entitled to a copyright at all").

[56] 17 U.S.C. § 102(a).

[57] 17 U.S.C. § 202; *cf.* 17 U.S.C. § 101 (distinguishing original works and copies along the tangibility-intangibility divide); *see e.g.*, A.S. Solomons v. United States, 21 Ct.Cl. 479, 483 (1886), *aff'd,* 137 U.S. 342 (1890) ("Intellectual property is the most intangible form of property; it still…is closer in analogy to real than to personal estate."); James Grimmelmann, *Indistinguishable from Magic: A Wizard's Guide to Copyright and 3D Printing*, 71 WASH. & LEE L. REV. 683, 698 (2014) ("You cannot see, touch, or hear a work…But copyright has no doubt that works exist; they are immanent in every copy even as they transcend this physical world.").

[58] 17 U.S.C. § 102(a); *see* 17 U.S.C. § 101 (defining the categories).

concept, principle, or discovery."[59] Although copyright vests automatically upon the work's creation,[60] initially in the work's author or authors,[61] which may mean the employer of the actual creator,[62] owners may also optionally submit to register their works with the U.S. Copyright Office,[63] which is a prerequisite for bringing an infringement action.[64] In examining registration applications, the Office gives consideration to procedural and formal information provided by applicants, as well as substantive consideration of "existence, ownership, or duration of the copyright."[65] The primary question for registration purposes, just like for a judicial finding of copyright's subsistence, is whether the work is an "original work of authorship," as required by the Copyright Act.[66] Although the USCO decisions do not determine the subsistence of copyright as such, the Office has substantial experience and expertise in originality assessments,[67] with courts affording a version of *Skidmore* deference to the Office's determinations.[68]

The standard of originality has become the "*sine qua non* of copyright," as held by the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co*.[69] Originality requires, first, that "the work was independently created by the author," rather than copied from other works, and second, "that [the work] possesses at least some minimal degree of creativity."[70] The bar to protection is not high – in fact, "the requisite level of creativity is extremely low; even a slight amount will suffice," and the "vast majority of works make the grade quite easily," possessing some "creative spark."[71] Instead of requiring novelty known

[59] 17 U.S.C. § 102(b) (idea-expression dichotomy).
[60] 17 U.S.C. § 101 ("A work is 'created' when it is fixed in a copy or phonorecord for the first time").
[61] 17 U.S.C. § 201(a).
[62] 17 U.S.C. § 201(b) (works made for hire).
[63] 17 U.S.C. § 408(a) ("[R]egistration is not a condition of copyright protection").
[64] 17 U.S.C. § 411(a) ("[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made").
[65] 17 U.S.C. § 409(10).
[66] 17 U.S.C. § 102(a).
[67] Norris Inus. v. Int'l Tel. & Tel. Corp., 696 F.2d 918, 922 (11th Cir. 1983).
[68] Nicole Pottinger & Brian L. Frye, *Registration is Fundamental*, 8 IP THEORY 1, 6 (2018); *see* Inhale, Inc. v. Starbuzz Tobacco, Inc., 755 F.3d 1038, 1041–42 (9th Cir. 2014); Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[69] 499 U.S. 340, 345 (1991).
[70] *Id.* Since independent creation does not require novelty, if an author independently creates a work identical or similar to an already existing one, they may obtain protection and be safe from a finding of infringement. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936).
[71] *Id.*

from patent law,[72] judges search for a mere "modicum of creativity,"[73] and are not to discriminate between good and bad art,[74] protecting works "no matter how crude, humble or obvious" the authorial expression may be.[75] Accordingly, the law will not protect facts but may protect their compilations,[76] nor will copyright extend to entirely generic elements, such as themes, settings, or stock characters;[77] or expressions which are so difficult to distinguish from ideas as to become merged.[78] All such building blocks belong in the public domain and cannot be owned.[79] Consequently, there is a "narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent."[80]

Originality can thus be described as a causation requirement, designating the link between the work and the mind of the human author.[81] As in law generally, so in copyright, causation must be

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[72] Baker v. Selden, 101 U.S. 99, 102 (1879) ("The copyright of the book, if not pirated from other works, would be valid without regard to the novelty…of its subject-matter."); David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 177 (2001) ("Copyright protection applies equally to works of 'high authorship' and to works of emphatically 'low authorship.'").

[73] 499 U.S. at 346.

[74] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-252 (1903) (Holmes, J.).

[75] 499 U.S. at 345; *cf.* Satava v. Lowry, 323 F.3d 805, 810 (9th Cir. 2003) ("[T]he amount of creative input by the author required to meet the originality standard is low, it is not negligible.").

[76] 17 U.S.C. § 103(a); *see* Jessica Silbey, *A Matter of Facts: The Evolution of the Copyright Fact-Exclusion and Its Implications for Disinformation and Democracy*, _J. COPYRIGHT SOC'Y U.S.A._(2025); Matt Blaszczyk, *Copyright Doctrine Before the Tribunal of Science: A Response to Professor Silbey*, _J. COPYRIGHT SOC'Y U.S.A_(2025).

[77] This is the so-called *scènes à faire* doctrine. Corwin v. Walt Disney Co., 475 F.3d 1239, 1251 (11th Cir. 2007) ("Incidents, characters, or settings that are indispensable or standard in the treatment of a given topic.") (cleaned up); *see e.g.*, Zahr K. Said, *Grounding the Scènes à Faire Doctrine*, 61 HOUS. L. REV. 349 (2023).

[78] This is the so-called merger doctrine. *See* Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT SOC'Y U.S.A. 417 (2016).

[79] Skidmore v. Zeppelin, 952 F.3d 1051, 1069 (9th Cir. 2020); Gray v. Hudson, 28 F.4th 87, 97 (9th Cir. 2022) ("[C]opyright *does* require at least a modicum of creativity and does not protect every aspect of a work; ideas, concepts, and common elements are excluded. Nor does copyright extend to common or trite musical elements, or commonplace elements that are firmly rooted in the genre's tradition. These building blocks belong in the public domain and cannot be exclusively appropriated..." (citation omitted)); *see also* Justin Hughes, *The Personality Interest of Authors and Inventors in Intellectual Property,* 16 CARDOZO ARTS & ENT. L.J. 81, 106 (1998) ("[C]reativity/originality requires a transformation not arising from the background order").

[80] Urantia Found. v. Maaherra, 114 F.3d 955, 959 (9th Cir.1997) (quoting *Feist*, 499 U.S. at 359) (quotation marks omitted).

[81] Tempo Music, Inc. v. Famous Music Corp., 838 F. Supp. 162, 169 (S.D.N.Y. 1993) ("[O]riginality, for copyright purposes, looks to creative process rather than novel outcomes or results"); *see also* Shyamkrishna Balganesh, *Causing Copyright*, 117 COLUM. L. REV. 1 (2017).

proximate, i.e., of the appropriate kind.[82] In this regard, at least since the 19th Century, the cognitivist metaphor of author's intellectual conception has demarcated the U.S. copyright terrain.[83] In *Feist*, the Court cited the cases of *Burrow-Giles Lithographic Co. v. Sarony*[84] and *The Trade-Mark Cases*,[85] rooting the emphasis on the "creative component of originality" in early copyright jurisprudence.[86] In *Sarony*, the Supreme Court considered the copyright in the photograph of Oscar Wilde, first establishing that a photographer can make creative, original choices, and secondly upholding the power of Congress to extend copyright protection to original photographs.[87] The *Feist* Court used *Sarony* to clarify that originality, properly construed in light of statutory instruments and the Constitution, never accommodated the *sweat of the brow* doctrine, where the expenditure of time, labor, or investment was considered relevant to finding originality. Sweat of the brow "flouted basic copyright principles," and the Court refocused the originality doctrine on

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[82] Glanville Williams, *Causation in the Law*, 19 CAMBRIDGE L. J. 62, 75-76 (1961) ("When the lawyer uses the concept of causation, he is not bound to use it in the same way as a philosopher, or a scientist, or an ordinary man. The concept can be moulded [sic] by considerations of policy").

[83] *See* Pohl v. MH Sub I LLC, 770 F. App'x 482, 486 (11th Cir. 2019); Home Legend, LLC v. Mannington Mills, Inc., 784 F.3d 1404, 1409 (11th Cir. 2015); Southco, Inc. v. Kanebridge Corp., 390 F.3d 276, 284 (3d Cir. 2004); Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1074 (9th Cir. 2000); Publications Int'l, Ltd. v. Meredith Corp., 88 F.3d 473, 479 (7th Cir. 1996); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58-60 (1884) ("[T]he constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author"); In re Trade-Mark Cases, 100 U.S. 82, 94 (1879) (recognizing the requirement of the work coming from "the fruits of [the author's] intellectual labor," in addition to independent creation). See also the cases which explained that copyright subsists in the embodiment of the intellectual conception, rather than the conception itself. White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 17 (1908); Oliver Ditson Co. v. Littleton, 67 F. 905, 907 (1st Cir. 1895); Johnson v. Donaldson, 18 Blatchf. 287, 3 F. 22, 24 (C.C.S.D.N.Y. 1880). Further, early dicta and commentary spoke of common law copyright using the metaphor of "intellectual production" and "mental conception." *See* Stowe v. Thomas, 23 F. Cas. 201, 202 (C.C.E.D. Pa. 1853); EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES EMBRACING COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYWRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS (1879).

[84] 111 U.S. 53 (1884).

[85] 100 U.S. 82 (1879); *see id.* at 94 ("While the word *writings* may be liberally construed, as it has been, to include original designs for engraving, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind.").

[86] 499 U.S. at 346; *see also* Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 352 (2017) (writing that the originality requirement was "stable" in the 19th century, requiring independent creation and minimal creativity).

[87] 111 U.S. at 58 ("[T]he constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author."); *see id.* at 55 (discussing "ordinary" photographs which fall below the threshold).

creativity.[88] That creativity, while minimal, must flow from the author and not another person or nature, and cannot be entirely conventional or functional.[89]

In other words, neither the ease with which one creates (e.g., using prompts), nor the expenditure of money (owning the AI program on the one hand, using traditional artistic means on the other) point towards originality or against it; creativity does. Together with establishing that originality allows for an author to make a work his own, the law recognized that technology, as such, does not break the causal chain. Copyright does not consider works of photography as "mere reproductions," and generally adheres to principles of aesthetic neutrality, even though it contains ideological presuppositions. They remain relevant to date.[90]

The following subsections show that originality is a crucial concept of copyright law, which is nonetheless a substantively low requirement. It is unclear whether AI-aided works present a break in the causal link between an author's mind and the work, rendering the work "authorless," or if AI-aided outputs are akin to works of photography, and thus protectable even when artistically unimpressive.[91]

1. Originality's Constitutional Place

In *Feist*, the Court clarified that originality, understood as independent creation and creativity, is a constitutional requirement.[92] Interpreting Article I, § 8, cl. 8 of the Constitution, which authorizes Congress to "promote the Progress of Science...by securing for limited Times to Authors...the exclusive Right to their...Writings," the Court determined that for particular work to be classified "under the head of

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[88] 499 U.S. at 354; *see* Elizabeth F. Judge & Daniel Gervais, *Of Silos and Constellations: Comparing Notions of Originality in Copyright Law*, 27 CARDOZO ARTS & ENT. L.J. 375, 408 (2009) (*Feist* "sent an unmistakable message that pure labor, or sweat of the brow, does not deserve protection. The social pact requires more, or something else."); *but see* Brian L. Frye, *Against Creativity*, 11 NYU J.L. & LIBERTY 426, 426 (2017) (arguing that *Feist* encourages "creativity rhetoric").

[89] ABS Ent., Inc. v. CBS Corp., 908 F.3d 405, 418 (9th Cir. 2018) ("[F]unctionally driven decision-making does not demonstrate the kind of originality with which copyright is exclusively concerned."); Matthew Bender & Company v. West Publishing Company, 158 F.3d 674, 682 (2d Cir. 1998) ("The creative spark is missing where: (i) industry conventions or other external factors so dictate selection that any person composing a compilation…would necessarily select the same categories of information, or (ii) the author made obvious, garden-variety, or routine selections") (citations omitted).

[90] *E.g.*, Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998); M. Margaret McKeown, *Art, Music, & Mashups: A View from the Bench on Creativity and Copyright*, 46 COLUM. J.L. & ARTS 109, 119–20 (2022) ("The same question confronting the Supreme Court in 1884 circles back to us today…").

[91] *See* Gervais, *Machine*, *supra* note 33, at 2106 (proposing an "originality causation" test); *cf.* Lucas S. Osborn, *Copyright, Creativity, and Skill: Authorship and AI-Assisted Works*, 12 BELMONT L. REV. 594, 594 (2025).

[92] 499 U.S. at 346.

writings of authors," it is " "unmistakably clear" that "originality is required."[93] For this reason, Congress is not authorized by the clause to protect writings which are not authors' "fruits of intellectual labor," embodied in tangible form.[94] In fact, as the majority found in *Eldred v. Ashcroft*,[95] and Justice Brennan opined in *Harper & Row Publishers, Inc. v. Nation Enterprises*,[96] the distinction between original authorial expression on the one hand, and ideas belonging to the public domain on the other, is required by the First Amendment.[97]

The idea-expression dichotomy is "at the essence of copyright," allowing for the "progress of arts and sciences and the integrity of First Amendment values."[98] Any further extension of property rights result in "curtailment in the free use of knowledge and of ideas."[99] Nonetheless, Congress has never ventured to go beyond this framework and, in fact, "copyrightable works" are a category narrower than the Constitution's "Writings."[100] Any apparent inequities involved in the refusal to protect the unoriginal fruits of labour or investment are not "some unforeseen byproduct of a statutory scheme intended primarily to ensure a return for works of the imagination" but an "affirmative choice" of the Congress.[101]

Works that are unoriginal are akin to ideas, rather than authorial expression, and cannot be constitutionally protected. This poses a challenge to "authorless" works or ones which are AI-generated, as argued by both the USCO and scholars.[102] At the same time, the co-

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[93] *Id.* at 345-46 (citing 100 U.S. at 94).

[94] *Id.* at 346 (cleaned up); Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 5 (1966) (Copyright Clause is both "a grant of power and a limitation"); *see generally* Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771 (2006).

[95] 537 U.S. 186 (2003); *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Fogerty v. Fantasy, Inc., 510 U.S. 517, 526-27 (1994).

[96]471 U.S. 539, 588 (1985) (Brennan, J., dissenting).

[97] 537 U.S. at 219 (citing 471 U.S. at 556 ("[C]opyright's idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." (cleaned up)); 471 U.S. at 547 ("The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality"); *see also* 471 U.S. at 580–81, (1985) (Brennan, J., dissenting) ("The 'originality' requirement now embodied in § 102 of the Copyright Act is crucial to maintenance of the appropriate balance between these competing interests"); *see* Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393 (1989).

[98] 471 U.S. at 604.

[99] *Id.* (citation omitted).

[100] H.R. Rep. No. 94-1476, at 51; *see also* Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229, 1237 (2016) ("Constitutional authority extends to all authors for all of their writings. But at any given time, Congress has only provided statutory protection for a limited class of works").

[101] 471 U.S. at 589–90 ("Copyright does not preclude others from using the ideas or information revealed by the author's work. It pertains to the literary...form in which the author expressed intellectual concepts." (citing H.R.Rep. No. 94–1476, at 56–57)).

[102] *See* Blaszczyk, *supra* note 55; Lemley, *supra* note 15.

dependent nature of the dichotomy, authorship, and originality, and their uncertain contours, makes it difficult to say which works are on the safe side, and which are not. As Justice Learned Hand remarked a century ago: "[n]obody has been able… and nobody ever can" draw a line between ideas and expressions, which always seems "arbitrary."[103] As demonstrated in Part II discussion of *Allen*, this poses a practical challenge to any protectability determinations, puts into question their legal legitimacy, and lack of conflict with neutrality principles. Finally, the conceptual uncertainty behind the principle introduces a methodological anxiety: while we operate under the assumption that there exists a "clear act," an unequivocal act of appropriation through original expression of an idea, akin to first possession in property law, there simply may not exist a clear "text" in either case.[104] Scholars have turned to "originality" and "creativity" in search of clearer answers, but as the following subsections show, they too are principles as fundamental as slippery.[105]

2. Originality as Non-Functional Expression

Since copyright requires originality and creativity, it excludes purely functional or utilitarian works or their aspects from protection.[106] For example, while copyright can apply to designs of useful articles or software, the former are protectable only if they are pictorial, graphic, or sculptural works "capable of existing independently of" the article's "utilitarian aspects."[107] The courts require those two elements to be conceptually separable,[108] which is why "a copyright on Van Gogh's painting would prevent others from reproducing that painting, but it would not prevent others from reproducing and selling the comfortable old shoes that the painting depicts."[109]

Likewise, in case law concerning computer-related applications, the courts have "extended [the] traditional copyright doctrine to exclude

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[103] Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930); *see also* Blaszczyk, *supra* note 76.

[104] *See* Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 84 (1985).

[105] *See* Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the "Digital Millennium"*, 89 MINN. L. REV. 1318, 1347 (2005) ("[E]ach side…tries to convince the other that its position is obvious and natural, whereas the other side's is radical and contrived."); *see generally* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 51 (1988), writing:

> [I]t will always be possible to show how today's decision is consistent with the relevant past ones, but, conversely, it will also be possible to show how today's decision is inconsistent with the precedents. This symmetry…drains 'consistency' of any normative content.

[106] *E.g.,* Torah Soft Ltd. v. Drosnin, 136 F.Supp.2d 276, 287 (S.D.N.Y. 2001) ("[F]unctional, as opposed to creative, alteration[s]," are unprotectable).

[107] 17 U.S.C.A. § 101.

[108] Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405 (2017).

[109] *Id.* 408 (Breyer, J., dissenting, joined by Kennedy, J.).

from protection against infringement those elements of a work that necessarily result from external factors inherent in the subject matter of the work" such as "hardware standards and mechanical specifications, software standards and compatibility requirements."[110] Since such elements concern functional aspects of a work, the courts apply the dichotomy between expression and ideas through the *scènes à faire* doctrine, so that "copyright rewards and stimulates artistic creativity in a utilitarian work in a manner that permits the free use and development of non-protectable ideas and processes that make the work useful."[111] According to the courts, upholding these traditional principles, however romantic they may sound, is justified on efficiency grounds, since filtering out unprotectable elements allows for computer programs' authors to employ standard techniques, without which the programs would not be compatible or functional in specific computing environments.[112]

What remains unseen from the above is that applying subsistence principles to software is anything but easy.[113] Extending copyright to computer programs once provoked considerable conceptual and economic controversy; it led to a statutory amendment, enacted regardless of dissenting voices.[114] In one case, the court found the computer program a literary work while likening it to "attempt[ing] to fit the proverbial square peg in a round hole."[115] Hard cases, such as non-literal copying or programming interfaces, continue to confuse legal analyses; scholars note that regardless of analytical or economic doubts as to protectability, it is here to stay.[116] Further yet, since the law came to see computers as tools, quite like cameras and typewriters, their use led to "no special problem" in protectability of computer-related works.[117] And the law's insistence that a computer is a tool and human the work's author, did not impede protectability in the area.[118]

Some of the leading scholars have thought the same should be true in relation to AI-aided outputs: unless they are too distant, which will be true only in extreme cases, they are authored by the user of the computer

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[110] Mitel, Inc. v. Iqtel, Inc., 124 F.3d 1366, 1375 (10th Cir. 1997) (citation omitted).
[111] *Id.*; *see generally* Said, *supra* note 77.
[112] *Id.*; Compulife Software Inc. v. Newman, 959 F.3d 1288, 1305 (11th Cir. 2020) (internal quotation marks omitted) (citing Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1547 (11th Cir. 1996)).
[113] Pamela Samuelson, *The Uneasy Case for Software Copyrights Revisited*, 79 GEO. WASH. L. REV. 1746, 1774 (2011).
[114] *See id.*; *see also* NAT'L COMM'N ON NEW TECH. USES OF COPYRIGHTED WORKS, FINAL REPORT 1 (1979) [hereinafter CONTU].
[115] Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 712 (2d Cir. 1992).
[116] Samuelson, *supra* note 113, at 1782.
[117] CONTU, *supra* note 114, at 196; *see generally* Robert C. Denicola, *Ex Machina: Copyright Protection for Computer-Generated Works*, 69 Rut. L. Rev. 251, 282-3 (2016); Zvi S. Rosen, *AI Authorship: A Case of History Repeating Itself?*, INDIANA L. REV. (forthcoming), https://ssrn.com/abstract=5135518, at *30.
[118] *See* Denicola, *supra* note 117, at 266.

program.[119] Others learn from this history that the law filters out unprotectable elements, and such are those "generated" by AI.[120] Humanists would emphasize that applying copyright causation principles has allowed the law to put boundaries on copyright expansion.[121] Regardless of functional, commercial, or artistic merit, unoriginal or authorless works remain unprotectable. Put simply: no matter how much something looks like a copyrightable work, it may not be one according to the law.[122] Copyright's norms always require an original, authorial contribution for the object to become a "work."[123] This contribution, however, at times is so minimal it approaches a fiction. Thus, the inquiry is back to square one.

The examples of software and useful articles shows that copyright may protect subject matter which does not fit easily with its principles if the works are commercially valuable enough. In such cases, the law tends to interpret rules liberally and realistically, employ authorial, creativity rhetoric, and rhetorically insist to be following orthodox principles. At the same time, copyright rejects both extreme examples of purely functional works and those who take orthodox principles too seriously, like the CONTU dissents. The question remains whether today's objections to AI outputs protectability will follow these footsteps; whether they are closer to the CONTU majority or those relegated to the footnotes.

3. Originality's Minimalism and the "Creativity Rhetoric"

Although the law requires original, creative, expressive authorship, not only is the requirement of creativity minimal, it is also infamously

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[119] *See id.* at 282; Samuelson, *supra* note 113, at 1192.

[120] *See* Gervais, *Machine*, *supra* note 33.

[121] *See* Meghan J. Ryan, *Secret Algorithms, IP Rights, and the Public Interest*, 21 NEV. L.J. 61, 75 (2020) ("[C]opyright protection as applied to software [is] quite limited…push[ing] software developers to seek protection…in…patent law").

[122] *See* Int'l News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting) ("Property, a creation of law, does not arise from value, although exchangeable—a matter of fact. Many exchangeable values may be destroyed intentionally without compensation…even if it took labor and genius to make it."); *see generally* HANS KELSEN, PURE THEORY OF LAW 3-4 (2nd edn., Max Knight trans., 1967) (distinguishing between facts belonging to physical reality and their legal meaning, i.e., interpretation by legal norms).

[123] *See* Stewart v. Abend, 495 U.S. 207, 234 (1990) (holding that an author "may receive protection only for his original additions," not "elements ... already in the public domain"); ABS Ent., Inc. v. CBS Corp., 908 F.3d 405, 414 (9th Cir. 2018) ("A copy…is not a separate work, but a mere representation or duplication of a prior creative expression."); Mazer v. Stein, 347 U.S. 201, 218 (1954) ("Absent copying there can be no infringement of copyright."); Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991) ("[T]he spirit of copyright law…oblige[s] all joint authors to make copyrightable contributions, leaving those with non-copyrightable contributions to protect their rights through contract.").

difficult to pin down,[124] with some calling it a "myth,"[125] "purely symbolic,"[126] or a "paper tiger,"[127] recognizing the doctrine's language of creative authorship primarily as "rhetoric"[128] or expression of "faith."[129] As Julie Cohen put it: "no one wants to be against creativity, and if copyright equals creativity then no one wants to be against copyright," adding that lawyers and scholars are often swayed by the creativity rhetoric.[130] Nonetheless, copyright, rather than requiring genius, sees ingenuity in the works of us all, some as trivial as a banana-shaped costume,[131] tree frog plush toys elements,[132] or before-and-after pictures of dental clinic patients' teeth.[133] Indeed, since *Sarony*, courts have routinely granted copyright in the most banal of photographs, with dicta pronouncing that "almost any photograph that reflects more than 'slavish copying'" would be protectable.[134] Similarly, following *Feist*, most factual compilations such as databases have been found copyrightable, despite the requirement of creativity.[135] This bears heavily on copyrightability of AI-generated works and the substantive reach of the requirement of human authorship, as argued below.

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[124] Pamela Samuelson, *Functional Compilations,* 54 HOUS. L. REV. 321, 357 (2016) ("*Feist* gave scant guidance about which characteristics or factors to look for in making a judgment about the type and quantum of creativity necessary to satisfy copyright's originality standard."); Michael J. Madison, *Beyond Creativity: Copyright as Knowledge Law,* 12 VAND. J. ENT. & TECH. L. 817, 830 (2010) ("But 'creativity' in *Feist's* sense gives advocates and courts few tools for distinguishing what is, and what is not, creative."); Ralph D. Clifford, *Random Numbers, Chaos Theory and Cogitation: A Search for the Minimal Creativity Standard in Copyright Law,* 82 DENV. U. L. REV. 259, 268 (2004) ("[T]he Court provided no clear guidance on what a 'creative spark' is.").

[125] Paul Szynol, *Copyright and the Myth of Creativity*, BERKELEY TECH. L. J. (2025, forthcoming), https://ssrn.com/abstract=4989527, at *3 (arguing that "copyright law has consistently arrogated content that isn't actually creative"); *see* Aaron X. Fellmeth, *Uncreative Intellectual Property Law*, 27 TEX. INTELL. PROP. L.J. 51, 51 (2019) (calling creativity an "insidious myth"); Dennis S. Karjala, *Copyright and Creativity*, 15 UCLA Ent. L. Rev. 169 (2008); Mark K. Temin, *The Irrelevance of Creativity: Feist's Wrong Turn and the Scope of Copyright Protection for Factual Works*, 111 PENN. ST. L. REV. 263, 271-72 (2006).

[126] *Id.* at 36.

[127] Mark Bartholomew, *Copyright and the Creative Process*, 97 NOTRE DAME L. REV. 357, 363 (2021).

[128] Frye, *supra* note 88, at 426.

[129] Bartholomew, *supra* note 127, at 358.

[130] Julie E. Cohen, *Copyright, Creativity, Catalogs: Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1192 (2007).

[131] *See* Silvertop Associates Inc. v. Kangaroo Manufacturing Inc., 931 F.3d 215 (3d Cir. 2019)

[132] *See* Coquico, Inc. v. Rodriguez-Miranda, 562 F.3d 62, 69 (1st Cir. 2009).

[133] *See* Pohl v. MH Sub I LLC, 770 F. App'x 482 (11th Cir. 2019).

[134] E. Am. Trio Prods. v. Tang Elec. Corp., 97 F. Supp. 2d 395, 417 (S.D.N.Y. 2000).

[135] Daniel J. Gervais, *The Protection of Databases*, 82 CHI. KENT L. REV. 1109, 1134 (2007).

a. American Romanticism

The roots of the minimalist originality threshold can be traced back to *Bleistein v. Donaldson Lithographing Co.*,[136] a case concerning infringement of advertisements depicting circus performers. Encapsulating the creativity rhetoric, Justice Holmes proclaimed that a work is "the personal reaction of an individual upon nature," which "always contains something unique," however modest it may be, copyrightable works always possess "something irreducible, which is one man's alone," and which cannot be copied by another.[137] The dictum's language has helped instill a belief that the "establishment of copyright…was one of the most instantly and thoroughly democratic statements [the Framers] had made,"[138] and that copyright law's "originality threshold low enough that all can enter, [gave] us a deeply egalitarian, democratic copyright law that has neither place nor need for the creative genius."[139] This conviction is undeniably strengthened by Holmes' pronouncement of the non-discrimination principle, according to which judges shall not "constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits,"[140] setting aside meritocratic concerns in favor of protecting anything that "command[s] the interest of any public," that has "commercial value."[141]

The effect of using the language of creativity, like in *Bleistein* and later *Feist*, is to afford a "cleavage of personality and progress in favor of commercial exchange."[142] Behind Holmes' rhetorical romanticism and subsistence minimalism – whether taken as "inclusive and emphatically liberal, egalitarian, and humanistic – and American,"[143] or "populis[t],"[144] "emasculate[d], "technical," and "anemic"[145]– lies copyright expansion to new subject matter and operation of the "work for hire doctrine," recognizing employer or corporate authorship.[146] In his opinion, Holmes gave "new content to the old form of authorship" in an effective rhetorical

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[136] 188 U.S. 239 (1903).
[137] *Id.* at 250.
[138] DAVID NEWHOFF, WHO INVENTED OSCAR WILDE: THE PHOTOGRAPH AT THE CENTER OF MODERN AMERICAN COPYRIGHT 9 (2020).
[139] Justin Hughes, *The Photographer's Copyright-Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339, 369 (2012).
[140] 188 U.S. at 251-252.
[141] *Id.* at 252.
[142] Jessica Silbey, *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 UC IRVINE L. REV. 405, 441 (2019)
[143] Beebe, *supra* note 86, at 369.
[144] Bartholomew, *supra* note 127, at 376; *see also* Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 483 (1991) (Bleistein left authorship "with little or no meaningful content and none of its traditional associations…generalizing the category of works that could be considered as copyrightable commodities").
[145] Bracha, *supra* note 36, at 224-47.
[146] 17 U.S.C. §§ 101, 201(b).

strategy to expand copyright protection," eliding the distinction between the fiction of corporate authorship and the fact of collaborative creation in a corporate setting.[147] Importantly, even for Holmes, protectability required personality; and it is only after personality or author's democratic individuality is found, that the constitutional purpose of progress may be fulfilled through the market.[148] Nonetheless, *Bleistein*'s doctrinal legacy has been to create a commodity-oriented regime, substantially erasing personality as a requirement, reducing it to a symbol.[149] Rightly or wrongly, the courts have come to subdue the personality requirement into the aesthetic neutrality prescription of Holmes' dictum.[150] This remains true even after the *Feist* corrective, which continues to lend an appearance of moral legitimacy through the language of creativity in works so generic that are entirely indistinguishable from those made by machines.[151] At least until the advent of AI, nearly all works possessed the requisite germ of author's individuality – including corporate "authored" works, which contained the personality of the wage-laboring actual creators dispossessed by the law and not recognized as statutory authors.

Bleistein has led to several famous obiters, including Judge Hand's pronouncement that "no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike."[152] Hand saw no place for originality in the constitutional scheme whatsoever, thinking that *Bleistein* altered the doctrine known from *Sarony*.[153] If it had, this has since been reversed by *Feist*. Nonetheless, doctrinal minimalism persists. One commentator points to the law's "indifference to actual creativity" and copyright's fundamental structure, including the idea-expression dichotomy, with the law "encourage[ing] the production of banal content."[154] This minimalism, as others argue, has been the idea all along – and it is to be "celebrated" as democratic vindication of common genius and individual dignity.[155] Minimalism's apex may lie in the era of generative AI. As one

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[147] Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 59 (2003).
[148] Beebe, *supra* note 86, at 369, 381.
[149] *See id.* at 331.
[150] *Id.*; *see also* Oren Bracha, *Commentary on Bleistein v. Donaldson Lithographing Co. 1903*, PRIMARY SOURCES ON COPYRIGHT (1450-1900), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_us_1903 ("The decision was a culmination of a trend that gathered force during the late nineteenth century of lowering the bar of any originality prerequisite for copyright protection almost to the point of disappearance").
[151] *See* Brian L. Frye, *The Authors' Petition*, 73 AM. U. L. REV. F. 231 (2024).
[152] Jewelers' Circular Publishing v. Keystone Publishing, 274 F. 932, 934 (S.D.N.Y. 1921).
[153] *Id.* at 935 ("The suggestion that the Constitution might not include all photographs seems to me overstrained."); *cf.* Hughes, *supra* note 139, at 371 n.170.
[154] *Id.* at 36.
[155] Beebe, *supra* note 86, at 369-71.

decision recognized, AI allows "less capable writers create works as well-written… and competing in the same categories" as those of more skilled authors,[156] potentially allowing everyday amateurs and the deprivileged to express themselves creatively. Is this newfound culture of semiotic democracy not the vindication of *Bleistein*'s vision, where works some regard as "vulgar" or "slop" come to be protected?[157]

b. Copyright by Thunderclap

Further, another judgement which remains important in the AI-era is *Alfred Bell & Co. v. Catalda Fine Arts*' lowest formulation of originality, reducing it to a but-for test.[158] Judge Frank held that originality, under the Constitution and the then-binding statute, requires merely that "the 'author' contributed something more than a 'merely trivial' variation," that is "something recognizably 'his own,'" regardless of how "poor artistically the author's addition."[159] On the facts, this allowed for mezzotint renditions of public domain paintings to be found original. Most controversially, the judge opined that the mezzotints would have been original even if the author had not attempted to be inexact in their copying: "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."[160] This, again, has been lauded for copyright's egalitarianism.[161]

While proponents of protection of AI-generated works rely on this obiter,[162] the extent to which the thunderclap dictum remains good law is disputable,[163] with authors expressing doubt about *Catalda*'s severance of the link between expression and volition,[164] and the broader legal

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[156] Bartz v. Anthropic, 3:24-cv-05417-WHA, at *7.

[157] *See* Katrina Geddes, *Generative AI's Public Benefit* (June 14, 2024; rev. May 30, 2025) (unpublished manuscript), https://ssrn.com/abstract=4865510.

[158] *See* Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 479 (2009).

[159] 191 F.2d at 102–03 (cleaned up, citation omitted).

[160] *Id.*

[161] Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569, 617 (2002).

[162] *E.g.*, Daryl Lim, *AI & IP: Innovation & Creativity in an Age of Accelerated Change*, 52 AKRON L. REV. 813, 838 (2018); Shlomit Yanisky-Ravid & Luis Antonio Velez-Hernandez, *Copyrightability of Artworks Produced by Creative Robots and Originality: The Formality-Objective Model*, 19 MINN. J.L. SCI. & TECH. 1, 39 (2018).

[163] *Catalda*'s obiter has not been relied on. It has been quoted in two unreported cases, one distinguishing it, another expressing reservation about its applicability. Stebbins v. Polano, No. 21-CV-04184-JSW, 2022 WL 2668371, at *4 (N.D. Cal. July 11, 2022), aff'd, No. 23-15531, 2024 WL 3963833 (9th Cir. Aug. 28, 2024); Godinger Silver Art Co. v. Int'l Silver Co., No. 95 CIV. 9199 (LMM), 1995 WL 702357, at *2 n.5 (S.D.N.Y. Nov. 28, 1995). Further, there is case law on unprotected photographs. *E.g.*, Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191, 197 (1999); *see also* Durham, *supra* note 161, at 588 (arguing *Catalda* was superseded by *Feist*).

[164] Nimmer, *supra* note 72, at 204–05 ("[A]lthough the defendant need not copy intentionally to be held liable, the plaintiff must intend to author in order for a work of

legitimacy concern regarding "dicta about dicta."[165] Doctrinally, "adoption" appears insufficient for an author to be proximate to their work since, per *Feist*, originality requires rooting in author's intellectual conception, or author's "personality" to use *Bleistein*'s phrase.[166] This became a humanist bulwark on which much of the USCO and scholarly rejection of protectability of AI-generated works rests.[167]

Nonetheless, while creative originality remains a requirement for all works to meet, its volitional and qualitative contents are minimal.[168] This becomes clear when the decision is read not for the "clap of thunder," but as emphasizing that "transformation is the essence" of authorship or that works are products of author's "peculiar astigmatic vision," expressions shaped by author's experiences, rather than outcomes of cartoonishly well-defined intellectual processes.[169] Accordingly, authors adapt raw materials found in nature and in others' expression, transform them, while the law renders the resulting outputs original works, which is a fiction denoting a more than trivial variation of that which already exists.[170] Since this is the essence of copyright subsistence, neither the USCO nor judicial interpretation of humanist principles are likely to present a meaningful obstacle to AI-assisted works' protectability. As argued in Part II, the USCO's Guidance does not do it, anyway. This leads to Part III's reading of the humanist project as a rhetorical pursuit of copyright legitimacy.

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authorship to emerge. Intentionalism hereby creeps back as a sine qua non for copyright protection"); *see also* Miller, *supra* note 158, at 479.

[165] *See* Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249 (2006).

[166] *See* Beebe, *supra* note 86, at 381. On the distinction between "adoption" and "compilations," see infra Part II.

[167] *See* Ginsburg, *supra* note 31, at 167 (the AI debate asks about "degrees of causation: but-for versus proximate").

[168] *See* Hughes, *supra* note 139, at 424-6; *see also id.* at 374 ("Saying that many photographs are not protected by copyright does not detract from the profoundly democratic character of copyright because it still says that every (human) photographer is capable of producing copyrighted works.").

[169] Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965, 1010–11 (1990).

[170] *Id.* at 969 ("originality is a legal fiction"); *see* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) ("[R]equirement[s] of substantial as opposed to trivial variation and the prohibition of mechanical copying… are inherent in and subsumed by the concept of originality"); Peter Mayer Publishers Inc. v. Shilovskaya, 11 F. Supp. 3d 421, 429 (S.D.N.Y. 2014) ("[O]riginality is 'distinguishable variation' that is more than 'merely trivial.'") (cleaned up, citations omitted); *see also* Robert Kasunic, *Copyright from Inside the Box: A View from the U.S. Copyright Office Keynote Address*, 39 COLUM. J.L. & ARTS 311, 312 (2016) ("*Catalda* may address originality with respect to independent creation, but it does not address the sufficiency of the creative contribution to justify federal copyright protection.").

B. Authorship

The Constitutional clause authorizes Congress to grant copyrights in fixed, original works to "authors,"[171] precluding the possibility of "authorless" works, and allowing anyone to own copyright only if it is "lawfully derived from the author."[172] While authorship is, in a sense, central to modern copyright, the term is not defined in the Constitution or the statute, while scholars have argued that the U.S. copyright law has "failed to work out a coherent theory of authorship in its two centuries of existence."[173] Rather than being recognized as a fully independent requirement of protectability, authorship has generally come down to a pragmatic identification of appropriate rightsholders over particular works; with the concepts of originality and fixation doing the substantive work.[174] Instead, the concept authorship has largely played a symbolic, expressive, and ideological role in copyright,[175] one which all normative theories of copyright employ, albeit in different ways.[176] This angle will be brought to the fore in Part II, where the Article deconstructs the USCO's apparent substantification of authorship, and Part III which puts this through the lens of legitimacy.

1. What is an Author?

The general principle associates the author with the creator of the copyrightable work, that is the supplier of creative originality.[177] Foundational cases define an author as "he to whom anything owes its

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[171] US Const Art I, § 8, cl 8.

[172] *See* Yuengling v. Schile, 12 F. 97, C.C.S.D.N.Y.1882; L. Batlin Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) ("[C]onstitutionally, copyright protection may be claimed only by 'authors.'"); Sherry Mfg. Co. v. Towel King of Fla., 753 F.2d 1565, 1568 (11th Cir. 1985) ("[U]nder the Constitution only an 'author' is entitled to copyright protection.") (citation omitted); Kelley v. Chicago Park Distr., 635 F.3d 290, 303 (2011) (finding that the Supreme Court has collapsed the explicit and implicit constitutional requirements of authorship, originality, and writings together).

[173] Buccafusco, *supra* note 100, at 1255; *see id.* at 1230 ("[T]he central terms of the copyright power have received little constitutional interpretation. Copyright jurisprudence did not begin with a theory of authorship, and it has not worked one out"); *see also* Bruce Boyden, *Emergent Works*, 39 COLUM. J.L. & ARTS 377, 379-80 (2016) ("Authorship lies at the heart of modern copyright law…Despite its centrality, however, authorship has never been formally defined"); Jaszi, *supra* note 144, at 455 (same).

[174] This is recognized by scholars most favorable to authorship. Shyamkrishna Balganesh, *Do We Need a New Conception of Authorship?*, 43 COLUM. J. L. & ARTS 371, 373 (2020) ("[I]n the absence of a clear doctrine to grapple with authorship, we're doing the work through these other different concepts–originality or fixation.").

[175] *Id.*; Balganesh, *supra* note 81, at 9 ("Scholars today understand authorship to be a largely amorphous idea within copyright law—one that plays a symbolic and expressive role rather than an analytical one"); *The Folklore and Symbolism of Authorship in American Copyright Law*, 54 HOUS. L. REV. 403 (2016) (same); Bracha, *supra* note 36, at 269-71.

[176] *See* Fisher, *supra* note 17.

[177] Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1077 (2003).

origin; originator; maker; one who completes a work of science or literature," which in turn are "all forms of writing…by which the ideas in the mind of the author are given visible expression."[178] More recently, case law interpreting the Copyright Act's provision that copyright ownership vests initially in the author or authors of the work,[179] speaks of the author as the "party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection."[180] One exception to this rule is the "work for hire" doctrine, which takes the employer and not the work's actual creator to be the work's author and first owner.[181] Another is that the courts look not only at physical proximity of the putative author to the work but also – as explained in *Feist* and a century before in *Sarony* – determine causation through the supply of creative originality,[182] in turn shaped by the courts' political and economic assumptions.[183]

Copyright's conceptions of authorship and originality are – at least at conceptual and rhetorical levels – committed to an image of the solitary human author,[184] in turn presenting difficulty in applying the law to some industries, such as cinema and video games, and to collective creativity at large.[185] Seventy years ago, a court spoke of authorship as implying a flow of "something meritorious from the author's own mind; that the product embodies the thought of the author, as well as the thought of others; and would not have found existence in the form presented, but for the

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[178] 111 U.S. at 56-7; *see also* 100 U.S. at 94.

[179] 17 U.S.C. § 201(a).

[180] Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989). Joint authors need to each make copyrightable contributions and have the intent to joint-author. 945 F.2d at 506-7.

[181] 17 U.S.C. §§ 101, 201(b); 490 U.S. at 737; Schrock v. Learning Curve Int'l, Inc., 586 F.3d 513, 524–25 (7th Cir. 2009); Hubay v. Mendez, 500 F. Supp. 3d 438, 448 (W.D. Pa. 2020).

[182] *See* Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 LAW & CONTEMP. PROBS. 3, 6 (1992).

[183] *Compare* RONALD DWORKIN, LAW'S EMPIRE 219 (1985) ("Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation.") *and* NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING (2005) (distinguishing normative and narrative coherence) *with* Brian Leiter, *In Praise of Realism (and against Nonsense Jurisprudence)*, 100 GEO. L.J. 865, 885 (2012) (calling integrity a "just-so story about justificatory ascent, constructed after the fact.").

[184] *E.g.* Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL'Y & L. 207, 218 (2007) ("[T]here is little doubt that copyright law reinforces an exclusionary ideal of the individual author."); Sonya G. Bonneau, *The Romantic Author as Compelled Speaker*, 97 TUL. L. REV. 53, 67 (2022) ("The romantic author construct…remains influential through rhetorical frames and organizing principles that often operate at an unconscious level to legitimate ownership interests").

[185] *See* Shani Shisha, *Fairness, Copyright, and Video Games: Hate the Game, Not the Player*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 694, 699 (2021); *see id.* at 724-25 (citing further examples).

distinctive individuality of mind from which it sprang."[186] This creativity rhetoric has continued through *Feist* into the AI-era, leading the *Thaler* district court to find that "[b]y its plain text, the 1976 Act thus requires a copyrightable work to have an originator with the capacity for intellectual, creative, or artistic labor."[187]

At the same time, the law has always been shaped by economic and political reasoning. In fact, the U.S. copyright law continues to "identify and reward an individual author," even when "it is evident that multiple people contributed creative expression to the final work,"[188] but also when such an author is a corporation, under the work for hire doctrine. Arguably, the law's association of the author with artistic control and inspiration allows to discriminate between forms of art and different contributors, and most importantly to disregard the "mere drudgery" of the employee – the law's humanism prioritizes the employer over the human creator.[189] In this way, the traditional theory of copyright has responded to the demands of industrialization – with sacrifices to coherence and the law's distributive effects covered by humanist rhetoric.[190]

2. Not Every Creator is an Author

Noticing that copyright at times decouples the "author" and the actual creator(s) of the work shows how legal principles discriminate between different contributions and indicates their policy priors. Since the author is not necessarily the person in the greatest physical proximity, but rather someone who makes the creative, original contribution, the author may not be the photographer pushing the button of the camera but their director,[191] the "master mind" who "actually formed the picture by putting the persons in position, and arranging the place where the people are to be."[192] This was the holding of a well-known New York case, where the court looked into the "degree of control over a film operation" held by the

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[186] Oxford Univ. Press, N.Y., Inc. v. United States, 33 C.C.P.A. 11, 18 (1945).
[187] Thaler v. Perlmutter, 687 F. Supp. 3d 140, 147 (D.D.C. 2023), aff'd, 130 F.4th 1039 (D.C. Cir. 2025).
[188] Aman K. Gebru, *Communal Authorship*, 58 U. RICH. L. REV. 337, 341 (2024).
[189] Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 298 (1992); *Metamorphoses*, *supra* note 144, at 485 ("Romantic vision of 'authorship,'…with all its individualistic baggage [has been] central to the conceptualization of the…'work-for-hire' doctrine.").
[190] Bracha, *supra* note 36, at 260 (recalling the law's "move to adjust traditional legal doctrines and categories to the new environment of corporate liberalism"). For examples, see Ginsburg & Budiardjo, *supra* note 16; Ginsburg, *supra* note 31.
[191] *See* Philadelphia & Trenton R. Co. v. Stimpson, 39 U.S. 448, 455 (1840) ("If, instead of writing with his own hand, the same author dictates to another person, cannot the amanuensis prove the dictation, and hence the authorship?").
[192] 111 U.S. at 61. The question of control remains important in the work for hire analysis as well. *See* Horror Inc. v. Miller, 335 F. Supp. 3d 273, 303–305 (D. Conn. 2018), *aff'd*, 15 F.4th 232 (2d Cir. 2021).

putative author.[193] On the facts, the court found that the director's choice of the type and amount of lighting used, the specific camera angles employed, and other choices meant that the "final product duplicate[d] his conceptions and visions of what the film should look like," even though the director did not "literally perform the filming."[194] Humanist scholars point to such creativity causation as encapsulating copyright's spirit: copyright rewards authors, not button pushers, whether wage-earning camera operators, machines, or those who just push the button.[195]

In cases such as *Aalmuhammed v. Lee*[196] and *Garcia v. Google, Inc.*,[197] the courts went even further, both in their interpretation of principles and in making explicit the economic and political priors. The *Lee* court not only distinguished creative and non-creative contributions, but also found that if authorship was attributed to all who make "substantial creative contribution[s]," the test could not distinguish between "the producer and director to casting director, costumer, hairstylist, and 'best boy.'"[198] Thus, according to the Ninth Circuit, not all creative, original contributions count, even if they are "striking."[199] This is because "no one would use the word "author" to denote" – relevant on the facts – the director of lighting contribution to the movie; his " creative contribution does not suffice."[200] The court found that it would be against the "social policy" established by the Constitution and carried out by statutory interpretation[201] to ascribe authorship to someone beyond the "top of the screen credits," who has the requisite "artistic control."[202] Thus, the court explained that artistic control and economic status coincide, in an "extreme expression of the romantic authorship concept."[203]

A couple of years later in *Garcia*, the circuit court reasoned that copyrighting creative contributions of particular actors in movies would

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[193] Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic, No. 97 CIV. 9248 (HB), 1999 WL 816163, at *5 (S.D.N.Y. Oct. 13, 1999).
[194] *Id.*; *see also* Andrien v. Southern Ocean County Chamber of Commerce, 927 F.2d 132, 135 (3d Cir.1991) ("[A] party can be considered an author when his or her expression of an idea is transposed by mechanical or rote transcription into tangible form under the authority of the party."); Horror Inc. v. Miller, 335 F. Supp. 3d 273, 312 (D. Conn. 2018), *aff'd*, 15 F.4th 232 (2d Cir. 2021).
[195] *See generally* Ginsburg & Budiardjo, *supra* note 16 (putting amanuensis in the AI context).
[196] 202 F.3d 1227 (9th Cir. 2000).
[197] 786 F.3d 733 (9th Cir. 2015).
[198] 202 F.3d at 1233.
[199] *Id.* at 1235.
[200] *Id.* at 1235-6.
[201] *Id.* at 1235-6.
[202] *Id.*
[203] F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225, 277 (2001); *see id.* at 331 (noting the "difficulty of fitting a highly collaborative work…into the various copyright authorship molds").

"splinter[] a movie into many different 'works,'" making "Swiss cheese of copyrights."[204] The court proclaimed that "legal niceties do not necessarily dictate whether something is protected by copyright"[205] and that entertaining subsistence theories like that of the actress who sued Google "could tie the distribution chain in knots."[206] Regardless of the multiplicity of contributions, the court treats a motion picture as a unitary whole, authored by a mastermind[207] – often a corporation – which secures stable ownership and the value of the underlying work, that is the commodity that copyright protects.[208]

These cases are both influential and somewhat unusual, since they make explicit the economic and private ordering considerations, of which judges usually remain silent. For all of their realism, however, they continue to adhere to the language of authorial creativity, which ensures that society continues to value copyrightable works – safeguards the "aura" – so that their price remains high, and they are not reduced to mere objects.[209] The law's insistence on the authorial folklore further lends an appearance of moral legitimacy to rightsholders' copyrights, filling out the normative void quite like possessory language has done in property law since Blackstone.[210] As the following subsections show, not only does copyright discriminate between different putative authors, but between works which it is willing to recognize as authorial; finally, despite its sometimes overtly humanist rhetoric, for a century U.S. doctrine has recognized non-human authors – corporations.

3. Inevitability of Aesthetic Discrimination?

Copyright's principles, together with the economic and policy considerations underlying them, affect not only the law's choice between persons who may be "authors," but also authorship's boundaries.[211] For

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[204] 786 F.3d at 742.
[205] *Id.* at 743.
[206] *Id.*
[207] *Id.*; Richlin v. Metro–Goldwyn–Mayer Pictures, Inc., 531 F.3d 962, 975 (9th Cir.2008).
[208] Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 538 (2005) (arguing that such is the purpose of property law).
[209] *See* Bonneau, *supra* note 184, at 63; Stefan Bechtold & Christopher Jon Sprigman, *Intellectual Property and the Manufacture of Aura*, 36 HARV. J.L. & TECH. 299 (2023); *see also* Fromer, *supra* note 25, at 1763 ("[U]tilitarianism and moral rights can play a joint role in structuring [copyright]"); *see generally* PIERRE BOURDIEU, THE FIELD OF CULTURAL PRODUCTION 76 (Randal Johnson ed., 1993) ("The ideology of creation, which makes the author the first and last source of the value of his work, conceals the fact that the cultural businessman…is at one and the same time the person who exploits the labour of the 'creator' by trading in the 'sacred'").
[210] *See* Rose, *supra* note 16; BOYLE, *supra* note 36, at 173 (comparing authorship to the will theory).
[211] *See* Pamela Samuelson, *Evolving Conceptions of Copyright Subject Matter*, 78 U. PITT. L. REV. 17, 54–57 (2016) (analyzing how the categories of subject matter expanded).

example, in *Kelley v. Chicago Park District*,[212] the Seventh Circuit found that a "living garden," that is a work of postmodern conceptual art, could not be copyrighted, because it did not constitute "the kind of authorship required for copyright."[213] The work originated in nature, and not "the intellect of the gardener," and natural forces determined its form.[214] As the court underlined, it did not matter what the artistic community thought for the law's conception of a copyrightable work; "the law must have some limits" and "not all conceptual art may be copyrighted."[215] This need for boundaries – whether interpreted as consequence of a principled view of the law[216] or of the law's aesthetic bias[217] – leads to "negative spaces" of creativity which are not protectable by copyright law,[218] with examples found in recipes, perfumes, folklore, and forms of collective creativity.[219]

The law's individualistic conception of authorship is difficult to reconcile with the practices of some industries – such as cinema – if not creativity at large, in light of the discourse on the "death of the author," which emphasizes the collaborative and distributed nature of artistic practice largely denied by copyright.[220] Copyright law's readiness to diverge from actual creative practices,[221] and copyright's rhetorical

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[212] 635 F.3d 290 (7th Cir. 2011).
[213] *Id.* at 304-305.
[214] *Id.* ("[G]ardens are planted…not authored").
[215] *Id.*
[216] *See* Shyamkrishna Balganesh, *The Immanent Rationality of Copyright Law*, 115 MICH. L. REV. 1047, 1061–68 (2017); *Copyright as Legal Process: The Transformation of American Copyright Law*, 168 U. PA. L. REV. 1101, 1176-77 (2020) (explaining that for the legal process school, while Congress assumes primacy in copyright lawmaking, the legitimacy of judicial rulemaking stems from engagement in "reasoned argument" and employment of principles internal to the doctrine).
[217] *See* Tushnet, *supra* note 13, at 29.
[218] *See generally* CREATIVITY WITHOUT THE LAW (Kate Darling & Aaron Perzanowski eds., 2017); *see also* Kal Raustiala & Christopher Jon Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).
[219] *See* Buccafusco, *supra* note 100, at 1251; Jaszi, *supra* note 189, at 302 (arguing that romantic authorship affects the law's ability to engage with "collective, corporate, and collaborative" writing practices, making works which do not fit into the "prevailing ideological framework of discourse in copyright…invisib[le]"); *see also* Guy A. Rub, *Owning Nothingness: Between the Legal and the Social Norms of the Art World*, 2019 B.Y.U. L. REV. 1147, 1169 (2019)
[220] In literary and artistic theory, the "concept of an author as a fixed, determinate authoritative source of both the work and its meaning has been discredited," with authorship understood as "constructed and constantly reconstructed by social and aesthetic practices," one which is "de-centred by our increased understanding of the importance of the reader…in giving meaning to the work." Patricia Loughlan, *Moral Rights (A View From the Town Square),* 5 MEDIA & ARTS L. REV. 1, 7 (2000); *see generally* Roland Barthes, *Death of the Author*, *in* IMAGE, MUSIC, TEXT 142 (Stephen Heath trans., 1977).
[221] *See* Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 276 (2009) (copyright's "fantasy of artistic creation has persisted even though it has been under assault for a very long time").

readiness to deflect the actual operation of the doctrine,[222] is difficult to square with the principles of aesthetic or technological neutrality, and copyright's broader appeal to popular legitimacy.[223] Indeed, aesthetic judgement is inherent to copyrightability, infringement, and fair use determinations, and since no aesthetic theory is neutral or all encompassing, bias is ever present.[224] This, unsurprisingly, the courts do not admit. As seen in *Bleistein*, judges invoke principles and objectivity,[225] masking that they make "subjective determination that reflects the personal values and background" since there is no philosophical or objective basis.[226] Today, however, technology cannot be separated from art any longer, since AI-aided works are not necessarily less beautiful or meaningful than traditional creative production.[227] And the principle of neutrality, today as historically, follows what is commercially valuable or popular – with both the technology and industry lobbying, and dominant modes of creation, determining copyright's boundaries. It may be one thing to reject postmodern art or graffities, and another to exclude AI-generated code of Microsoft.[228]

The Supreme Court continues to emphasize the principle of non-discrimination, claiming that it assesses only "content" – *e.g.*, originality – rather than "merits" of works.[229] Even if that were true, by designating some forms of expression as copyrightable and others as free to take (*e.g.*, old blues riffs), ostensibly neutral principles have affected black

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[222] *See* Lemley, *supra* note 36, at 879 ("[R]omantic authorship does not in fact tell us very much about the legal rules").

[223] *See* Jani McCutcheon, *Natural Causes: When Author Meets Nature in Copyright Law and Art. Some Observations Inspired by Kelley v. Chicago Park District*, 86 U. CIN. L. REV. 707, 736 (2018) (arguing that *Kelley* "creates a dissonance between copyright and significant genres of artistic practice, and risks destabilizing its integrity and legitimacy"); Neal F. Burstyn, Note, *Creative Sparks: Works of Nature, Selection, and the Human Author,* 39 COLUM. J.L. & ARTS 281, 310 (2015) (same).

[224] *See* Yen, *supra* note 90, at 251; Brian L. Frye, *Aesthetic Nondiscrimination & Fair Use*, 3 Belmont L. Rev. 29, 29 (2016); Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1, 2 (2001) (recognizing that discrimination is necessary in such circumstances).

[225] Keith Aoki, *Contradiction and Context in American Copyright Law*, 9 CARDOZO ARTS & ENT. L.J. 303, 339 n.230 (1991) ("[W]henever the *Bleistein* nondiscrimination principle is invoked, it inevitably serves as a justification…blatant judicial value discriminations"); Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 857 (2005) ("[C]ourts' explicit resistance to engage in aesthetic analysis only masks that they do so nonetheless").

[226] Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 231–32 (1990).

[227] *See* Frank Fagan, The *Un-Modeled World: Law and the Limits of Machine Learning*, MIT COMP. L. REP. 1, 5 (Sep. 6, 2022), https://law.mit.edu/pub/the-un-modeled-world (Writing of the "technological colonization of mystery.").

[228] *See* Shani Shisha, *Commercializing Copyright*, 65 B.C. L. REV. 443, 443 (2024).

[229] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 544 (2023) ("A court should not attempt to evaluate the artistic significance of a particular work").

musicians negatively.[230] This desperate effect, both at the level of "content" and economic costs, is reinforced by the registration system, which reintroduces formalities while taking on the "qualities of other social stratifications that divide along lines of class, gender, and race."[231] Copyright's contentious neutrality, together with the positivist refusal to explicitly embrace non-legal standards taken from aesthetics, psychology, or neuroscience when assessing authorship, creativity, and other concepts,[232] put at stake the "credibility and legitimacy of copyright law itself."[233]

This tension seemingly reaches an apogee in the case of AI-aided production. If the Office purports to exclude any works which use prompt-based generative AI, it risks undermining the law's principles of neutrality, its legal and democratic legitimacy.[234] Such critiques do not come solely in corporate form but also semiotic democracy and protection of minorities, which object to the "divide between high and low-brow works, sustaining the aura of art according to a cultural hierarchy," maintained by copyright and reified by the registration system.[235] Reading the USCO publications, one may think this is the very idea:

> If a flood of easily and rapidly AI-generated content drowns out human authored works in the marketplace, additional legal protection would undermine rather than advance the goals of the copyright system. The availability of vastly more works to choose from could actually make it harder to find inspiring or enlightening content Indeed, AI training itself is reportedly reliant on human-generated content, with synthetic data leading to lower-quality results.

In other words, in rejecting works involving AI, copyright institutions find themselves in a difficult position. On the one hand, copyright should not appear biased or incorporating high versus low art distinctions, which have been eschewed for a century. On the other hand, humanists insist

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[230] K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 358–59 (1999).

[231] John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L.J. 1399, 1451 (2009).

[232] *See* Cohen, *supra* note 130, at 1152 (exploring the methodological anxieties leading to this state of affairs).

[233] Lionel Bently & Laura Biron, *Discontinuities Between Legal Conceptions of Authorship and Social Practices: What, If Anything, Is To Be Done?, in* THE WORK OF AUTHORSHIP 237, 263 (Mireille van Eechoud, ed., 2014).

[234] *See* RYAN ABBOTT, THE REASONABLE ROBOT: ARTIFICIAL INTELLIGENCE AND THE LAW (2020) (advocating for "AI legal neutrality"); *see also* Edward Lee, *AI and the Sound of Music*, 133 YALE L.J.F. 187 (2024), https://www.yalelawjournal.org/pdf/LeeYLJForumEssay_9bmuaspb.pdf (arguing for technology neutrality); Geddes, *supra* note 157 (critiquing the law from the perspective of semiotic democracy).

[235] Tehranian, *supra* note 231, at 1402.

that it is precisely the principles of neutrality which dictate copyright not to allow for AI-generated or AI-aided works which fall below standards applicable to traditional art.[236] Lastly, all the pretenses to neutrality in copyright as elsewhere, or disclaimers of the aesthetic and aura, are suspect.[237] After all, without aura, societal appreciation of the value of copyrightable commodities may be undermined, cutting the very branch on which the law sits.

4. Corporations Are Authors, too

According to the "work for hire" provisions of the Copyright Act, the employer or commissioner is by default "considered" both the owner of "all of the rights comprised in the copyright" and "the author for purposes of this title."[238] In other words, the employer – who may be a corporation or another legal person – is "considered the author *ab initio*, and is vested from the work's creation with all rights to economically exploit the work."[239] The U.S. is internationally exceptional[240] in treating this fiction as one of "authorship and not of transfer of rights," that is presuming the employer "to be the author initially and not by virtue of a post-creation transfer."[241] The actual author – the human being – is one only in the "colloquial sense;"[242] never "owned the copyrights," and thus does not have any of the economic rights, such as one to assignment.[243] "Colloquial," here as elsewhere, means not legally relevant,[244] and courts have routinely contrasted the actual "creator" of the work with its

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[236] *See* Ginsburg & Budiardjo, *supra* note 16.

[237] *E.g.*, Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L. J. 997 (examining liberal neutrality).

[238] 17 U.S.C. §§ 101, 201(b).

[239] Ennio Morricone Music Inc. v. Bixio Music Grp. Ltd., 936 F.3d 69, 72 (2d Cir. 2019) (emphasis added) (contrasting 17 U.S.C. § 201(b) with Italian law); *see also* Siegel v. Time Warner Inc., 496 F. Supp. 2d 1111, 1142 (C.D. Cal. 2007) ("[T]he copyright to a work made for hire is owned at its inception by the commissioning party.")

[240] *E.g.*, Robert A. Jacobs, *Work-For-Hire and the Moral Right Dilemma in the European Community: A U.S. Perspective*, 16 B. C. INT'L & COMP. L. REV. 29 (1993).

[241] Rodrigue v. Rodrigue, 55 F. Supp. 2d 534, 543 (E.D. La. 1999).

[242] *See* Shapiro, Bernstein & Co. v. Bryan, 123 F.2d 697, 699 (2d Cir. 1941) (Learned Hand J.).

[243] Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 137 (2d Cir. 2013); Waite v. UMG Recordings, Inc., 450 F. Supp. 3d 430, 434 (S.D.N.Y. 2020)

[244] *See* Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemp. Dance, Inc., 380 F.3d 624, 634 (2d Cir. 2004) ("[L]egally regarded as the 'author,' as distinguished from the creator of the work, whom Learned Hand referred to as 'the 'author' in the colloquial sense.'"); *cf. e.g.*, Gracen v. Bradford Exch., 698 F.2d 300, 304 (7th Cir. 1983) ("[A]rtistic originality is not the same thing as the legal concept of originality in the Copyright Act."); Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1078 (9th Cir. 2000) (contrasting legal and "colloquial" meanings of "derivative work"); Greene v. Ablon, No. CIV.A. 09-10937-DJC, 2012 WL 4104792, at *11 (D. Mass. Sept. 17, 2012) (same regarding "joint work"); Love v. The Mail on Sunday, 489 F. Supp. 2d 1100, 1108 (C.D. Cal. 2007) (same regarding "partnership").

"author,"[245] "statutory author,"[246] deemed author,[247] author "for purposes of copyright proprietorship."[248]

In other words, the U.S. copyright has long recognized corporate authorship, posing a challenge to the doctrinal blackacre – and the requirement of human authorship examined below – while the rhetoric of the solitary human author remains "alive and well."[249] It forms part of copyright discourse, so much so that recent scholarship defines the author as a "human being who intends to produce one or more mental effects in an audience," or similar, and does not even mention the work for hire.[250] At the same time, giant corporations – which own the vast majority of commercial valuable copyrights – not only are found by the law to be authors and owners, but utilize the rhetoric of romantic authorship in lobbying and litigation.[251] Indeed, the "language of…legal battles has remained much the same as it was three hundred years ago, but the stakes have changed."[252] Therefore, while copyright's rhetoric portrays culture as a "product of human activity and developed by human effort,"[253] one which the law protects and promotes by incentivizing authorial effort, in fact copyright "devalues the very individual who is capable of making the most significant contributions towards its institutional aim."[254] As argued below, this is in tension not just with the law's humanist rhetoric, but also the constitutional grant, and copyright's claims to legal, moral, and popular legitimacy.

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[245] Est. of Burne Hogarth v. Edgar Rice Burroughs, Inc., 342 F.3d 149, 156 (2d Cir. 2003) ("[T]he employer is legally regarded as the "author," as distinguished from the creator of the work"); *id.* at 161 ("[P]arty commissioning the work is regarded as the 'author,' entitled to all rights of copyright").

[246] 342 F.3d at 158 (citing Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises, 815 F.2d 323, 327 (5th Cir.1987)).

[247] 342 F.3d at 159.

[248] 380 F.3d at 631; *see also* Siegel v. Time Warner Inc., 496 F. Supp. 2d 1111, 1136 (C.D. Cal. 2007) ("[I]n the interpretation and construction of this title...the word 'author' shall include an employer in the case of works made for hire") (citing 17 U.S.C. § 26 (repealed)).

[249] Jaszi, *supra* note 144, at 302.

[250] Buccafusco, *supra* note 100, at 1260; *see* Nimmer, *supra* note 72 (same); Ginsburg & Budiardjo, *supra* note 16 (same in the AI-context); Christopher M. Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251, 292 (2011) ("A work of authorship is a planned sensory experience, designed by its author to give rise to an expressive experience in the mind of one or more intended audiences.") (not mentioning work for hire); *cf.* Litman, *supra* note 169, at 1009 ("[R]omantic model of authorship is implicit in much commentary about copyright").

[251] BELLOS & MONTAGU, *supra* note 7, at 198-99.

[252] *Id.* at 17.

[253] Alina Ng Boyte, *The Conceits of Our Legal Imagination: Legal Fictions and the Concept of Deemed Authorship*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 707, 760 (2014).

[254] *Id.*

5. From Corporate to Algorithmic Authorship

The work for hire doctrine has animated those who analogize AI to employees, so that "owners" may have the fruits of their labor.[255] This seems simple enough: if a corporation is an author, then authorship is not uniquely human.[256] The challenges to humanist authorship do not necessarily stem from analytical scholasticism or devotion to radical robot rights causes; at times, they entail advocacy for the interests of non-human non-authors, such as publishers, or non-human authors, such as corporations.

The most conspicuous example is found in Ryan Abbott's advocacy for AI authorship, which is explicitly rooted in the conviction that "copyright protection is for corporations that invest in creative content," and not to provide an incentive "for people like J.K. Rowling and George R.R. Martin."[257] Since corporations are recognized as authors not because they are "morally deserving," but because it "results in benefits for people" trickling down, AI should be recognized as an author, too.[258] Even more strikingly, Abbott argues that AI-generated works ought to be owned by "AI owners," that is corporations and not users, for "legal and policy reasons."[259] Corporate ownership of AI-generated content "encourages investments in developing AI systems–and it encourages owners to license their AI systems," supporting "further creation and dissemination of works" and "ensuring well-defined property rights."[260] If this was not enough, Abbott dismissed concerns over distributive effects as irrelevant to subsistence,[261] as attempting to "punish[] entities simply for being large,"[262] and in a rather puzzling turn, as not appreciating the possibility that corporate ownership of AI-generated works is actually "democratiz[ing]."[263]

This is a line of argumentation which the USCO explicitly rejected by asserting the requirement of human authorship. As argued in Part II, the requirement's doctrinal foundation is narrow: works need to be ascribed to some human creator. While the Office's interpretation is broader, it cannot meaningfully fulfill the promises of protecting human authors in

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[255] *E.g.*, Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 5 STAN. TECH. L. REV. 1, 26 (2012); Margot E. Kaminski, *Authorship, Disrupted: AI Authors in Copyright and First Amendment Law*, 51 U.C. DAVIS L. REV. 589 (2017).
[256] *Id.*; Nina I. Brown, *Artificial Authors: A Case for Copyright in Computer-Generated Works*, 20 COLUM. SCI. & TECH. L. REV. 1, 29 (2018).
[257] Ryan Abbott, *Machine Rights and Reasonable Robots, Remarks*, 60 WASHBURN L.J. 429, 440 (2021).
[258] *Id.* at 430–31.
[259] Ryan Abbott & Elizabeth Rothman, *Disrupting Creativity: Copyright Law in the Age of Generative Artificial Intelligence*, 75 FLA. L. REV. 1141, 1196 (2023).
[260] *Id.* 1198.
[261] *Id.* at 1190.
[262] *Id.*
[263] *Id.*

the AI-era and allows it to protect an array of AI-assisted works. At the same time, the requirement rejects arguments flaunting basic principles of originality causation and, ironically, does not deny the substance of corporate authorship. Instead, it conceals corporate authorship nominally and does the same to AI-mediated creative production.

PART II. THE HUMAN AUTHORSHIP REQUIREMENT

According to the Office, "copyright can protect only material that is the product of human creativity," while the term "author," as used in the legislation and the Constitution, "excludes non-humans."[264] The Office points to cases such as *Sarony*, which used "language excluding non-humans in interpreting the congressional power to provide 'authors' the exclusive right to their 'writings.'"[265] There, the Supreme Court designated the author as the creator of the work, referred to authors as human, described them as a class of "persons," and spoke of copyright being the "the exclusive right of a man to the production of his own genius or intellect."[266] Furthermore, in several decisions regarding works created by animals,[267] "living gardens,"[268] or works of alleged divine origin,[269] courts have expressed the principle that "authorship is an entirely human endeavor'" and that "[a]uthors of copyrightable works must be human."[270] Similarly, dicta read that "authorship is an entirely human endeavor,"[271] that "authors" must be "human,"[272] and that works "owing their form to forces of nature"[273] or divine beings cannot be copyrighted.[274] In the famous "monkey selfie" case, *Naruto v. Slater*, both the district and circuit courts' dicta pointed to the requirement of human authorship found in the text of the Copyright Act – which e.g., refers to an author's "children," "widow," "grandchildren," and "widower" – terms which "imply humanity and necessarily exclude animals."[275]

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[264] Registration Guidance, 88 Fed. Reg. at 16,191.
[265] *Id.* at 16,191.
[266] *Id.* (citing 111 U.S. at 56-8).
[267] *See* Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018).
[268] Kelley v. Chicago Park Dist., 635 F.3d 290 (7th Cir. 2011).
[269] Urantia Found. v. Kristen Maaherra, 114 F.3d 955 (9th Cir. 1997).
[270] 635 F.3d at 304 (citations omitted).
[271] *Id.* at 304 (citation omitted).
[272] *Id.*
[273] *Id.*
[274] Oliver v. Saint Germain Foundation, 41 F.Supp. 296, 297-99 (S.D.Cal. 1941).
[275] Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018). The circuit court decided *Naruto* on the ground of standing, not authorship. While the monkey had Article III standing, it lacked statutory standing under the Copyright Act, because the statute did not plainly state otherwise. *Id.* at 426. In the district court, however, Judge Orrick considered explicitly the question of authorship. He found that "there is no mention of animals anywhere in the Act," that the court was not presented with "a single case that expands the definition of authors to include animals;" instead, appellate case law has "repeatedly

Finally, as the Ninth Circuit proclaimed in *Urantia Found.* v. *Kristen Maaherra*,[276] a case involving a book of supposed divine revelations, it is not "creations of divine beings that the copyright laws were intended to protect" and "some element of human creativity must…occur[]" for the work to be copyrightable.[277] This has led the USCO find that human authorship is required for both copyrightability and registrability of works in the U.S., which is an approach favored by the drafters of the *Restatement*,[278] treatises,[279] and most importantly, by humanist copyright scholars.[280]

While dicta provide support for the proposition that copyright requires an identifiable human author, it is less clear whether they support an expansive requirement of excluding "non-human authorship" from protectability, and if they support the Office's interpretation of this boundary.[281] Both the USCO and the humanist copyright scholars are doing something more than explaining that a chatbot is not the legal author and owner of an image it generates from a prompt. After all, this is a "wrong question,"[282] a "distraction;"[283] something only those stuck in "doctrinal mud" may come up with.[284]

The institution of the human authorship requirement involved subtle conceptual moves: exclusion of AI-works from protectability not on the grounds on originality (which is a thicker concept) but on the basis of authorship (which is substantively thin);[285] presenting the dichotomy not between authorial and authorless works, but rather works which are human and non-human authored.[286] The turn to the concept of human

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referred to 'persons' or 'human beings' when analyzing authorship under the Act," and so has the USCO. Naruto v. Slater, 2016 WL 362231, at *3-4 (references omitted).

[276] 114 F.3d 955 (9th Cir. 1997).

[277] *Id.* at 957-59.

[278] *See* Restatement of the Law, Copyright § 6 TD No 2 REV (2022) ("'Authorship' by nonhumans not recognized"); *see id.* ("[T]he work must have been created by a human employee or a human being commissioned to create the work.").

[279] *See* 2 PATRY ON COPYRIGHT § 3:19.

[280] *See supra* notes 8-10; *see also* Molly Torsen Stech, *Copyright Thickness, Thinness, and A Mannion Test for Images Produced by Generative Artificial Intelligence Applications*, B.C. INTELL. PROP. & TECH. F. 1, 1 (2024) ("Human authorship has always been…a foundational requirement for copyright protection to subsist in a work.").

[281] *See generally* Denicola, *supra* note 117.; *see also* Samuelson, *supra* note 15; Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977 (1993).

[282] Burk, *supra* note 14, at 1676.

[283] Zachary Cooper, The *AI Authorship Distraction: Why Copyright Should Not Be Dichotomised Based on Generative AI Use* (July 24, 2024), https://ssrn.com/abstract=4932612.

[284] Samuelson, *supra* note 15, at 1200.

[285] *Cf.* Gervais, *Machine*, *supra* note 33.

[286] *Cf.* Ginsburg, *supra* note 31.

authorship is supported by a rhetoric which makes it a full-fledged symbol; one which, nonetheless, is legally with a rather limited bite.[287]

A. The U.S. Copyright Office's Position

According to the *Compendium of U.S. Copyright Office Practices*, the Office will "register an original work of authorship, provided that the work was created by a human being."[288] Since copyright is "limited to 'original intellectual conceptions of the author,' the Office will refuse to register a claim if it determines," through a fact-specific inquiry, that "a human being did not create the work."[289] This extends to works "produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author," and works produced by nature, animals, plants, or supernatural beings.[290] Regarding works involving AI, the Office will inquire whether the work in question is computer assisted or whether the "traditional elements of authorship in the work," such as "literary, artistic, or musical expression or elements of selection, arrangement," were "actually conceived and executed not by man but by a machine."[291] This requirement of human authorship has been upheld by the Office for several decades,[292] recently leading to the issuance of the 2023 Registration Guidance requiring that AI-generated elements which are "more than de minimis" must be disclosed and excluded by applicants for registration.[293] Again, if the "traditional elements of authorship" are produced by AI, the work lacks human authorship, and will not be registered by the USCO.[294]

1. USCO's Rhetoric of Difference and the Shift to Authorship

While the Office takes the fundamental difference between humans and machines seriously, it recognizes that one may copyright works where AI was "used as a tool" or where a human determined the output's expressive elements.[295] After all, a legal requirement of human

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[287] *See* Balganesh, *supra* note 175, at 430 ("The ideals (and rhetoric) of authorship motivate the institution at a symbolic level, and yet find little instantiation in copyright doctrine and practice").
[288] COMPENDIUM (THIRD), § 306.
[289] *Id.*; *see also* Guidance, at 16,192; USCO, COPYRIGHTABILITY, *supra* note 39, at ii ("[C]opyrightability is determined on a case-by-case basis").
[290] *Id.*, § 313.2; *see also* Guidance, at 16,192.
[291] *Id.* (citing U.S. COPYRIGHT OFFICE, REPORT TO THE LIBRARIAN OF CONGRESS BY THE REGISTER OF COPYRIGHTS 5 (1965)).
[292] Guidance, at 16,192; *see* SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1965, at 5 (1966).
[293] *Id.* at 16,193.
[294] *Id.* at 16,192. The Office requires only a brief and generic description, and applicants are not required to list specific tools used.
[295] USCO, COPYRIGHTABILITY, *supra* note 39, at 41.

authorship – and the refusal to recognize AI or an animal as an author – does not necessarily bar protection of *any* works if AI-generated works cannot in fact exist, and there always remains sufficient human authorship. Under the old view of the CONTU report, any "creativity" in the machine's output is attributable to human beings, whether programmers or users, and thus "[n]o machine is itself a source of creativity."[296] Accordingly, to reject AI authorship "requires no novel twists of doctrinal logic;" as long as "machines follow our instructions, they are incapable of being more than obedient agents in the service of human principals."[297]

The law's originality minimalism means that even works "created solely by a machine" might "qualify for protection."[298] At the same time, by presenting the question as one of authorship, the concept which has generally been devoid of substantive content, the law's revolt against the machines may be mainly performative.[299] Indeed, the very scholars who have argued against protection of AI-generated works have done so mostly on the basis of originality,[300] sometimes in the abstract and without delineation of what should count as human authored,[301] and often distancing from a fully-fledged requirement of human authorship as such.[302] As I wrote elsewhere:

> Protection of emergent works is impossible. Without an author, there is no expression of ideas which can be original, and thus no copyrightable work….Emergent works fall outside of copyright's positive ontology, being akin to ideas, facts, or subject-matter predicated by technical considerations, rather than authorial creativity. In other words, they do not exist as things in law and thus cannot as such be owned.[303]

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[296] Ginsburg & Budiardjo, *supra* note 16, at 402-408.
[297] *Id.*; *cf.* Denicola, *supra* note 117, at 266.
[298] Samuelson, *supra* note 15, at 1199.
[299] *See* James Grimmelmann, *There's No Such Thing as a Computer-Authored Work - And It's a Good Thing, Too*, 39 COLUM. J.L. & ARTS 403, 404 (2016) ("[T]he underlying problems of assigning authorship are more apparent than real-or rather, they are no worse [in the AI context] than elsewhere in copyright"); *id.* at 408 ("If an author, for her own convenience, decides to automate some of the steps by programming a computer, copyright should not look any less generously upon her."); Dan L. Burk, *Thirty-Six Views of Copyright Authorship, by Jackson Pollock*, 58 HOUS. L. REV. 263, 266 (2020) ("AI systems offer the illusion of independent and autonomous creation").
[300] *See* Gervais, *Machine*, *supra* note 33.
[301] *E.g.*, Carys Craig & Ian Kerr, *The Death of the AI Author*, 52 OTTAWA L. REV. 31, 44 (2021) (the article does not "propose specific answers to policy questions"); Giancarlo Frosio, *Should We Ban Generative AI, Incentivise It Or Make It A Medium For Inclusive Creativity?*, *in* A RESEARCH AGENDA FOR EU COPYRIGHT LAW (Enrico Bonadio & Caterina Sganga eds.) 61 (does not distinguish between AI-generated and AI-assisted works while advocating to protect human authorship), https://ssrn.com/abstract=4527461.
[302] *See* Ginsburg & Budiardjo, *supra* note 16, at 434.
[303] Blaszczyk, *supra* note 55, at 1.

This is also how the district court in *Thaler* put the matter: plaintiff could not own the copyright, because none "existed in the first instance," and one cannot give what one does not have.[304] By contrast, the Office makes human authorship an explicit, substantive requirement; presenting a divide between us, humans, and the non-human others.[305] At times, the Office appears not to see AI as an intervening cause in the creative process – one which breaks the authorial chain between the work and the human being, simply making the human and the output insufficiently proximate – but rather to exclude the "creations of non-humans" from copyright,[306] and requiring applicants to "exclude non-human authorship" from registration claims.[307] Such a republican rhetorical turn may be rooted in want of sociological legitimacy.[308]

In its publications, the Office at times appears to extol AI, at other times to denigrate it, but always to underline its fundamental difference with humans. For example, the Guidance states that prompts function "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," rendering the outputs as non-human authored, and uncopyrightable.[309] In a decision applying it, however, the Office put it differently, finding that the AI tool Midjourney does not "interpret prompts as specific instructions to create a particular expressive result because Midjourney does not understand grammar, sentence structure, or words like humans."[310] Similarly, in its *Generative AI Training Report*, the Office claims that AI model training "transcends the human limitations that underlie the structure of the exclusive rights," and stresses that "AI learning is different from human learning."[311] While

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[304] 687 F. Supp. 3d at 145.

[305] Guidance, at 16191 („Most fundamentally, the term 'author,' which is used in both the Constitution and the Copyright Act, excludes non-humans."); *cf.* Jeremy Waldron, *Community and Property -- For Those Who Have Neither*, 10 THEO. INQ. L. 161 (2009) ("[C]ommunity and property are…exclusionary concepts…[A]lthough 'community' sounds like a warm, inclusive word, real-world communities…define themselves by reference to an array of excluded 'others'").

[306] Second Request for Reconsideration for Refusal to Register SURYAST (SR # 1-11016599571; Correspondence ID: 1-5PR2XKJ, Dec. 11, 2023) at *3, https://www.copyright.gov/rulings-filings/review-board/docs/SURYAST.pdf [hereinafter *Suryast*].

[307] Second Request for Reconsideration for Refusal to Register Théâtre D'opéra Spatial (SR # 1-11743923581; Correspondence ID: 1-5T5320R, Sep. 5, 2023), at *2, https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf [hereinafter *Théâtre*]; U.S. Copyright Office, Cancellation Decision re: Zarya of the Dawn (VAu001480196) at *4 (Feb. 21, 2023)) [hereinafter *Zarya*].

[308] *See* Balganesh, *supra* note 174, at 371 ("The rhetoric and the notion of authorship are doing a lot of analytical work in a variety of cases—certainly…in…the Copyright Office['s] Compendium.").

[309] Guidance, at 16,192.

[310] *Théâtre*, *supra* note 307, at *6-7 (citing Zarya *supra* note 307, at *1) (cleaned up).

[311] U.S. COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE, PART 3: GENERATIVE AI TRAINING (PRE-PUBLICATION VERSION) at *48,

the former "involves the creation of perfect copies with the ability to analyze works nearly instantaneously…creat[ing] at superhuman speed and scale," humans "retain only imperfect impressions of the works they have experienced, filtered through their own unique personalities, histories, memories, and worldviews."[312] Elsewhere, the Office downplays AI's creative capacities, writing that "we can all sometimes finish another's sentences," and AI's capacity to do so is not unusual in comparison with humans.[313] This has allowed the Office to affirm not only human exceptionalism, rejecting the view of scholars who consider creativity to be algorithmic in nature,[314] but also imply that although copyright incentives may not be "appropriate or necessary" for the products of AI, they are necessary for human authorship.[315]

2. Human Authorship's Minimalism

Although the Office does not lower the stakes as much as some commentators, arguably it does not attempt to be a romantic site of resistance other than in rhetoric.[316] Throughout its copyrightability report, the Office reassures that "in *many* circumstances [AI-generated] outputs will be copyrightable in whole or in part,"[317] that "[i]n *most* cases…humans will be involved in the creation process, and the work will be copyrightable to the extent that their contributions qualify as authorship,"[318] that the Office had already registered hundreds of works incorporating AI-generated material, and that the guidance will be periodically reconsidered.[319] If a work containing AI-generated material also contains sufficient human authorship, the USCO will register the human's contributions.[320] The Office may recognize protection extending to:

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https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf.

[312] *Id.*

[313] *Id.* at *6 ("This is not an unusual task for humans—we can all sometimes finish another's sentences.").

[314] *But see* Bridy, *supra* note 255, at 69 ("[A]ll creativity is algorithmic"); Grimmelmann, *supra* note 299, at 407-8 ("[A]ll authorship is algorithmic").

[315] *See* Shira Perlmutter, *Foreword*, *in* U.S. COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE, PART 1: DIGITAL REPLICAS (July 2024), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-1-Digital-Replicas-Report.pdf; *Copyright Then and Now: A Half-Century of Change*, 50 AIPLA Q. 559, 569 (2022); *cf.* Samuelson, *supra* note 15.

[316] *Cf.* Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 S. CAL. INTERDISC. L.J. 491, 572 (1998) ("Legal practice is rhetoric all the way down...").

[317] USCO, COPYRIGHTABILITY, *supra* note 39, at 41 (alteration added).

[318] *Id.* at 8 (alteration and emphasis added).

[319] *Id.* at 3 (emphasis added).

[320] Guidance at 16,192-93.

1. The human-authored, original elements, with AI-generated elements disclaimed;[321]
2. All elements provided the AI-generated materials are sufficiently modified by a human author;[322]
3. All materials, original and unoriginal, with the whole being protected as a compilation.[323]

Finally, what the Office does not explicitly state, but is true by operation of law, copyright will also extend to works which satisfy doctrinal subsistence requirements as recognized by the courts, regardless of the USCO's stance. This may end up extending copyright to prompted works.

3. "Prompts Alone" are Insufficient

The most controversial part of the USCO's stance is that "prompts alone do not provide sufficient human control to make users of an AI system the authors of the output."[324] Prompts are defined by the USCO as inputs into generative-AI systems which communicate the desired features of the output, typically describing a topic, theme, subject, and sometimes the overall style, tone, or visual technique.[325] According to the Office, prompts are essentially like instructions conveying unprotectable ideas.[326] While sufficiently detailed prompts "could contain the user's desired expressive elements," they still "do not control how the AI system processes them in generating the output,"[327] regardless of how many times a user runs the AI or revises the prompt.[328] This is, in part, because AI can automatically optimize prompts, so that outputs "may include content that was not specified and exclude content that was,"[329] and the results are oftentimes inconsistent.[330] Since complex AI systems are unpredictable – they are black boxes, "built on models with billions of parameters," which even experts cannot understand well[331] – while they may "reflect" one's

[321] *Id.* 16,192-3 (copyright will "protect the human-authored aspects"); *see also* USCO, COPYRIGHTABILITY, *supra* note 39, at 1; *see e.g.*, Rose Enigma, VAu001528922 (Mar. 21, 2023).
[322] *Id.* at 16,192-3 (human author may "modify material originally generated by AI…to such a degree that the modifications meet the standard for copyright"); *see also* USCO, Copyrightability, at 1.
[323] *Id.* at 16,192-3 (human author may "select or arrange AI-generated material in a sufficiently creative way"); USCO, COPYRIGHTABILITY, *supra* note 39, at 1 ("Neither the use of AI as an assistive tool nor the incorporation of AI-generated content into a larger copyrightable work affects the availability of copyright protection for the work as a whole").
[324] USCO, COPYRIGHTABILITY, *supra* note 39, at 18.
[325] *Id.* at 5.
[326] *Id.* at 18.
[327] *Id.* at 18.
[328] *Id.* at 20.
[329] *Id.* at 6; *see id.* at 19-20.
[330] *Id.* at 7.
[331] *Id.* at 6.

idea, they do not allow for controlling "the way that idea is expressed."[332] According to the Office, the number of possible outputs resulting from the same prompt may be infinite.[333] Therefore, it does not amount to artistic control, and extending protection would be contrary to both the statute and the Constitution.[334]

a. Simple Prompts

The theoretical basis of rejecting "simple prompts" is found in the Office's rejection of the authorship by adoption theory, known from the *Catalda* obiter.[335] The USCO likened "adopting" an output of AI without a human authorial, original contribution to asserting ownership in ideas or trying to copyright nature, agreeing with copyright humanists such as Gervais and Ginsburg.[336] Gervais argues that in generative AI, prompts are essentially unprotectable instructions, while "[s]electing one output among many would not constitute a source of originality, any more than selecting a painting in a large art gallery would."[337] If the law was to allow for the adoption theory of subsistence, the reasoning goes, all of copyright's concepts – idea-expression dichotomy, originality, and authorship – would be undermined, turning copyright "upside down."[338] Essentially, there would not exist a causal requirement for ownership, and no possibility to distinguish between the private and the public.[339] This, as explained above, would be an unconstitutional undermining of the idea-expression dichotomy.[340]

b. Complex Prompts

While simple prompts do not lead to copyright in the AI's output, creators' use of sophisticated prompts complicates the analysis. The Office's 2023 *Guidance* hinted at a limited prompt-based approach, which would recognize copyrightability provided a user gives "sufficiently detailed instructions" to AI, shaping the ultimate work.[341]

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[332] *Id.* at 19.
[333] *Id.* at 20.
[334] *Id.*; *but see* Matthew Sag, Pamela Samuelson, and Christopher Jon Sprigman, *Comments in Response to the Copyright Office's Notice of Inquiry on Artificial Intelligence and Copyright* (Oct. 4, 2024), https://ssrn.com/abstract=4976391, at *4.
[335] *Id.* at 21.
[336] *Id.* at 18, 21; *see also* Ginsburg & Budiardjo, *supra* note 16, at 370.
[337] Gervais, *Second-Degree*, *supra* note 33, at 1106; *see* Ginsburg, *supra* note 31, at 143 (describing lack of copyright in "found objects"); *see also* Lemley, *supra* note 15, at 197 ("[P]rompters don't own the ideas they contribute and AIs can't own the expression they contribute.").
[338] Lemley, *supra* note 15, at 190.
[339] *See* MORTON J HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 199 (1992).
[340] *See supra* Part I.B.1; *see also* Lemley, *supra* note 15, at 195 ("Ensuring that copyright doesn't protect ideas is…a fundamental part of what makes copyright law constitutional.").
[341] Lemley, *supra* note 15, at 199.

Some have argued that while there is "no reason in principle why prompts couldn't be detailed enough to meet the traditional threshold of authorship,"[342] the copyright would be "extremely narrow," found in "rare cases" of successive prompts use.[343] Most scholars open to the idea caution that it is uncertain if the current technology allows for sufficient authorial control to deem one the output's author, and in any case copyright would extend to outputs traceable to the text of the prompt itself or the creativity underlying it, that is to "a few peripheral elements."[344]

Seemingly, the Office has revised its approach, abandoning the possibility of copyright through complex prompts in the 2025 report, leading to the *Allen* litigation analyzed below. Underneath lies the insistence that machines are fundamentally different from humans: thus, while the unpredictability involved in Jackson Pollock's expressionist technique is legally fine, the unpredictability of the machine is qualitatively different, making the output insufficiently proximate. Thus, the USCO and humanists like Ginsburg currently claim that iterating hundreds of prompts is not enough, and neither is selecting resulting outputs.[345] Otherwise, the humanists fear, copyright would lose legal legitimacy, allow for copyright by adoption, and diminish the law's anthropocentrism.

While the Office rejects *Catalda* obiter's "thunderclap" theory, it does not put into doubt the case's holding: copyright requires only non-trivial variation of what is found in nature or generated by AI, including in "compilations" and "modifications." Therefore, even on the USCO's expansive exclusion of prompt-based authorship, there are other subsistence avenues reducing the rule's scope. Otherwise, the rulemaking could be legally illegitimate due to apparent conflicts with doctrinal minimalism and aesthetic neutrality principles. As argued below, the human authorship requirement is nominal and will not lead to the exclusion of AI content or the protection of human creators.

4. Between Compilations and Modifications

Doctrinal orthodoxy entails that unoriginal or non-authorial outputs – ideas, information, facts – are not protectable per se. At the same time, original works which incorporate such elements by modifying or creatively arranging them are copyrightable, though protection ought to be "thin," allowing for a wide range of non-infringing uses.[346] These avenues to authorship have historically allowed for protectability of fact-intensive works – such as news articles, laying at the foundation of

[342] Sag et al., *supra* note 334, at *3.
[343] Gervais, *Second-Degree*, *supra* note 33, at 1104.
[344] Lemley, *supra* note 15, at 201-02; *but see* Osborn, *supra* note 91, at 594.
[345] Ginsburg, *supra* note 31, at 143.
[346] *See* Boyden, *supra* note 140, at 391.

modern civil society[347] – and have only grown more commercially important since.[348] The USCO recognizes these principles, though its *Report* at times uses language and examples suggesting that protection in such works is exceptional, and so do scholars committed to humanist copyright, downplaying compilation's and transformation's importance.[349] Nonetheless, both the doctrine on which the Office relies, and the USCO's guidance and registration decisions suggest that compilations and modifications significantly curtail the requirement of human authorship.

a. The USCO Position

According to the *Report*, where the Office can easily discern copyrightable human input – such as a drawing uploaded into a generative AI tool which is used to modify it or a film which includes AI-generated special effects – the Office recognizes copyrightability and registrability of the final work, but not of the AI-generated elements themselves.[350] Similarly, where generating content is the initial or intermediate step, for example where a user edits, adapts, enhances, or modifies AI-generated content, "human authorship may still be added in the final product."[351] Finally, the Office acknowledges protectability and registrability of works where humans select, coordinate, and arrange AI-generated material in a creative way.[352]

In this regard, the USCO's Report somewhat confusingly distinguishes "prompts alone" and tools offered by "[m]any popular AI platforms" which "encourage users to select, edit, and adapt AI generated content in an iterative fashion," citing Midjourney's "Vary Region and Remix Prompting" and ChatGPT's "canvas" tools,[353] which allow for inpainting, targeting specific elements of works, and greater creative control over the end-result. While these may be useful guideposts for the

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[347] *See* Robert Brauneis, *The Transformation of Originality in the Progressive-Era Debate over Copyright in News*, 27 CARDOZO ARTS & ENT. L.J. 321 (2009); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) ("[C]opyright is in essence a state measure that uses market institutions to enhance the democratic character of civil society").

[348] *See* Silbey, *supra* note 76 (critiquing copyright in fact-intensive works).

[349] Gervais, *Second-Degree*, *supra* note 33, at 1112 ("One must also avoid the pitfalls of reading too much into 'selection and arrangement.'").

[350] *See e.g.*, Rose Enigma, VAu001528922 (Mar. 21, 2023); *see also* Heather M. Whitney & Joseph C. Gratz, *In re Rose Registration Cover Letter* to Robert J. Kasunic (Mar. 21, 2023). While Ginsburg claims this proves an exception to the exclusion of prompted works, the registration in the final work was "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," i.e., in a pen and paper drawing inputted by Kashtanova into the program. *Cf.* Ginsburg, *supra* note 31, at 144-46.

[351] USCO, COPYRIGHTABILITY, *supra* note 39, at 24.

[352] *Id.* at 24-5.

[353] *Id.* at 26.

public, creative selection, coordination, or arrangement is a theory of authorship available to users of all kinds of tools.[354]

This is confirmed by the Review Board decisions which refused registration in AI-generated elements but offered to register the same works as compilations.[355] For example, in *Zarya of the Dawn*, the Board agreed that the "the selection and arrangement of the images and text in the Work are protectable as a compilation," which were the "product of human authorship."[356] Another such work is *A Single Piece of American Cheese* (which the USCO first found uncopyrightable, to then register it as a compilation).[357] Finally, in some decisions, such as the *Théâtre D'opéra Spatial*, the Board indicated willingness to do the same, as long as the applicant makes appropriate disclaimers.[358] He refused, testing the rule in judicial review. That said, the imposed by the USCO is more procedural than substantive and pertains to registration not copyright.[359]

Finally, the current approach contrasts with former Register Pallante's openness to non-human subject matter protectability. As she wrote, "innovation thrives on creative expression—whether or not that is reserved to the human race."[360] She explicitly mentioned *Feist*'s low requirements for "copyrightability in general, and compilations of uncopyrightable facts[] in particular," to first to consider that a monkey might be an author, but also that a human may author the simian's work through "arrange[ment]," "design," or "produc[tion]."[361] While it remains open to debate if the Office has changed its view of copyright or merely its rhetoric, the use of human authorship narrative has concealed how minimalist the subsistence requirements are, risking undermining the

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[354] *See* Edward Lee, *AI-generated image received copyright registration based on "selection, coordination, and arrangement." Yes, in the United States. How?*, CHATGPTISEATINGTHEWORLD (Feb. 11, 2025), https://chatgptiseatingtheworld.com/2025/02/11/ai-generated-image-received-copyright-registration-based-on-selection-coordination-and-arrangement-yes-in-the-united-states-how.

[355] *See* Zarya, *supra* note 307, at *5; Katelyn Chedraoui, *This Company Got a Copyright for an Image Made Entirely With AI. Here's How*, CNET (Feb. 24, 2025), https://www.cnet.com/tech/services-and-software/this-company-got-a-copyright-for-an-image-made-entirely-with-ai-heres-how.

[356] Zarya, *supra* note 307, at *5.

[357] Letter from Gina Giuffreda to Judd Lauter (Jan. 30, 2025), Re: A Single Piece of American Cheese (1-14119617821), at *1 ("We find that [the work] 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.") (on file with the author); *see also* Glidin' - Official Music Video, PA0002516205 (Sep. 13, 2024).

[358] *Théâtre*, *supra* note 307, at *8.

[359] *But see* Edward Lee, *The Code Red for Copyright Law*, 76 FLA. L. REV. F. 1, 10 (2024) (arguing that the Guidance introduced a "substantive rule requiring the works to embody 'traditional elements of authorship,' in order to qualify for copyright."); *cf.* Danny Friedmann, *Creation and Generation Copyright Standards*, 14 NYU J. INTELL. PROP. & ENT. L. 51 (2024).

[360] Pallante, *supra* note 48, at 143.

[361] *Id.* at 129.

Guidance's legal legitimacy for the sake of copyright's moral and popular appeal.[362]

b. The "Celestial Beings" Cases

The human ability to copyright non-human created subject matter through original compilation, selection, coordination, and arrangement, has been recognized in the very case law which grounds the human authorship requirement. In *Maaherra*, right after the Ninth Circuit asserted the human authorship requirement, the court distinguished between a revelation, which is uncopyrightable like facts or ideas, and its expression and compilation by humans.[363] The court applied *Feist* to grant copyright in the compilation of materials of an alleged celestial origin.[364] The judgement pointed that humans "chose and formulated the specific questions asked" to the spiritual beings, contributed to the structure of the whole work, the arrangement of the revelations in each of its parts, and the organization and order in which the celestial beings authored elements followed each other.[365] Finally, the circuit court reasoned that as long as the first humans to claim copyright exercised the *Feist* modicum "'in such a way that the resulting work as a whole constitutes an original work of authorship,'"[366] the human authorship requirement presents no obstacle to protection.

Going even further, a district court applying *Maaherra* was willing to recognize copyrightability of the work in question – supposedly dictated by Jesus – either as a compilation or, alternatively, as an original work of the medium, reasoning that "[a]s a matter of law, dictation from a non-human source should not be a bar to copyright."[367] The court preferred this latter basis, rather curiously applying an old English case concerning "automatic writing," which led to simply identifying the human being in the closest proximity.[368] The case of *Penguin Books* may thus indicate that irrespective of the creativity rhetoric, the requirement of human authorship, and the constitutional roots of *Feist*'s conception of originality, the U.S. courts may be willing to employ instrumental "but for" analysis. In this way, the courts were indeed willing to recognize the requirement of human authorship as both a "symbolic ideal within the

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[362] *Cf.* Wells, *supra* note 15, at 1016 (analyzing judicial sacrifices of legal legitimacy for the sake of public acceptance).
[363] 114 F.3d at 957-59.
[364] *Id.* at 958.
[365] *Id.* at 959.
[366] *Id.* at 958.
[367] Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd., 2000 WL 1028634, at *12 (S.D.N.Y. July 25, 2000). As in *Maaherra*, the court found that even if "the non-human author had the final say, the humans had at least some input into, and effect on, the form and content." *Id.* at 11; *see also* Garman v. Sterling Pub. Co., No. C-91-0882 SBA (ENE), 1992 WL 12561293, at *3 (N.D. Cal. Nov. 5, 1992).
[368] *Id.* at *12 (citing Cummins v. Bond, [1927] 1 Ch. 167).

system" and a "substantive feature of copyright doctrine."[369] The substance, however, may lie in symbolism.

c. Humanists' False Hope

The possibility of copyrighting AI-generated outputs as compilations or modifications could make the project of a committedly humanist copyright appear to be a merely scholastic venture. Unsurprisingly, Ginsburg and Budiardjo limit their discussion of compilations to a footnote,[370] while Gervais argues that "[s]electing one or a few outputs from a machine that produces many more is simply not a form of authorship," and a compilation must entail something more than "selecting one object out of a pile."[371] Even if the humanist approach recognized by the Office and several scholars prevails, and if *Catalda* and the *Penguin Books* obiters allowing for authorship by "adoption" are bad law, compilations and modifications limit the ambit of the human authorship rule.

After all, *Feist* originality requires little more than a mechanical arrangement such as white pages, i.e., the modicum of creativity involved in selecting, coordinating, and arranging facts or other uncopyrightable outputs.[372] Case law has recognized copyright in compilations where the "aggregation of elements signifie[d] additional creative effort by the author" so that the end result was "more than a mere copy of what came before."[373] Although not every work constitutes a copyrightable compilation,[374] and the copyright will be "thin,"[375] scholars have recognized the low bar to protectability,[376] and proposed to apply it in the AI context.[377] The same could be said regarding modifications which, like compilations, could potentially extend copyright to AI-generated works, and not just their parts. While every author makes minimal contributions, copyright "magically" extends it to protect the whole; reminding of property law's accession more than possession and keeping principled romanticism to the minimum.[378]

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[369] Balganesh, supra note 81, at 9.
[370] Ginsburg & Budiardjo, *supra* note 16, at 448 n.336.
[371] Gervais, *Second-Degree*, *supra* note 33, at 1107, 1112.
[372] Key Publications, Inc. v. Chinatown Today Pub. Enters., Inc., 945 F.2d 509, 513 (2d Cir. 1991).
[373] Boyds Collection, Ltd. v. Bearington Collection, Inc., 360 F. Supp. 2d 655, 660 (M.D. Pa. 2005)
[374] *See* Satava v. Lowry, 323 F.3d 805, 811 (9th Cir.2003); Open Source Yoga Unity v. Choudhury, No. C 03-3182 PJH, 2005 WL 756558, at *3 (N.D. Cal. Apr. 1, 2005).
[375] Pamela Samuelson, *Functional Compilations*, 54 HOUS. L. REV. 321, 367 (2016).
[376] *See* Karjala, *supra* note 96, at 185.
[377] Edward Lee, *Prompting Progress: Authorship in the Age of AI*, 76 FLA. L. REV. 1445, 1515 (2024).
[378] *See* Litman, *supra* note 169, at 1011–12; *see also* Ginsburg, *supra* note 31, at 147 (admitting that the "absence of protection for the separate components" of AI-generated compilations "probably is of little consequence," because the value of the work lies in their assemblage).

5. Opening the Floodgates

The Office's interpretation of human authorship, while widely-seen as expansive, has already allowed for registration of over a thousand of works containing-AI generated materials since passing the 2023 Registration guidance.[379] These include computer programs which disclaim source code generated by artificial intelligence,[380] or even the authorship of the program itself;[381] books which disclaim AI-generated illustrations;[382] motion pictures excluding AI-generated material;[383] and musical works which receive registration for lyrics, but not the AI-generated music.[384] The disclaimers required by the registration are barely intelligible: one work which lists "text" as the basis of claim specifies the exclusion as "text generated by artificial intelligence."[385] And this is not an outlier.

In addition to minimal disclosure requirements, there are also examination and enforcement difficulties at conceptual and practical levels. In registrations such as *A Single Piece of American Cheese*, there had been several different rationales of rejecting the work before the examiners finally granted the registration. It is difficult to assess how prevalent such reversals are, since the Office does not make the examination procedure and the involved correspondence public. This signals legal uncertainty with widespread effects. In fact, the Office's own economists admit that it "is not yet clear that policies toward AI-generated work can practically diverge from those toward human-generated work," as the two may be indistinguishable, while registration applicants have no

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[379] Search results of registrations in the period of Mar. 17, 2023, to Apr. 27, 2025, for material excluded containing the phrase "Artificial Intelligence" reveal 2,072 entries, "AI generated" reveal 487 entries, "AI assisted" reveal 3 entries, and "non human" reveal 12 entries. *See also* Miriam Lord, *US Copyright Office on AI: Human Creativity Still Matters, Legally*, WIPO Magazine (Apr. 24, 2025), https://www.wipo.int/web/wipo-magazine/articles/us-copyright-office-on-ai-human-creativity-still-matters-legally-73696 ("The Office has registered more than a thousand works where applicants have followed our guidance").

[380] *E.g.*, Adobe Product Analytics 2024, TX0009443009 (June 17, 2024) (excluding "source code generated by artificial intelligence (Github Copilot)"); Adobe Journey Optimizer B2B Edition 2024, TX0009443007 (Jul. 29, 2024).

[381] *E.g.*, Fire Spotter, TXU002436023 (Jan. 30, 2024) (excluding "computer program authorship generated by artificial intelligence").

[382] *E.g.*, Modern Principles of Economics, Sixth Edition, TX0009398408, (Mar. 8, 2024); Lucky, VA0002384040, (Oct. 18, 2023); Claire and The Magical Kingdom, VAU001522709 (May 15, 2023).

[383] *E.g.*, The Meg 2: The Trench, Pa0002454550 (Aug. 25, 2023); Secret Invasion "Promises" (102), Pa0002447900 (Sep. 15, 2023).

[384] *E.g.*, Breaking My Own Heart, PAU004243599 (Oct. 15, 2024); Bailando Juntos, PA0002482916 (June 10, 2024); Caelum's Adventure, PA0002482917 (June 10, 2024).

[385] Life Skills for Teens: The Ultimate Guide to Transform Yourself Master Time, Boost Productivity, Forge Strong Relationships, and Make Smart Decisions for a Better You, TX0009412531 (June 30, 2024).

incentives to self-report the level of AI involvement.[386] It may thus be practically impossible to exclude AI-generated works, regardless of doctrinal questions, or to consistently determine which works are "AI-generated" rather than "assisted," making the whole endeavor simply populist.[387] In other words, the impracticality of a humanist approach indicates it may be about rhetoric, not results.

Finally, many AI-generated and AI-assisted works are never submitted for registration, not only because subsistence of copyright does not depend on registration, but also in cases where the material is clearly uncopyrightable or infringing.[388] Such materials find success among the audiences on platforms like Spotify quite regardless of their copyrightability.[389] Nonetheless, some of the works which have been submitted for registration have, however, been refused.[390] They have given rise to the test cases of *Thaler* and *Allen* analyzed below.

B. Thaler v. Perlmutter

The Copyright Office's refusal to register Stephen Thaler's *A Recent Entrance to Paradise* – a work he claimed to have been "autonomously generated" by an AI system, lacking "traditional human authorship" – has been affirmed by district and circuit courts. The D.C. Circuit, emphasizing that "[a]uthors are at the center of the Copyright Act,"[391] held that the statute "requires all eligible work to be authored in the first instance by a human being."[392] Judge Millet quoted with approval the district court's conclusion that "[h]uman authorship is a bedrock

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[386] USCO ECONOMISTS, *supra* note 23, at 8.

[387] For applications of "populism" beyond constitutional law, see e.g., Herbert Hovenkamp, *The Future of Antitrust Populism*, 77 FLA. L. REV. 417 (2025); Anna di Robilant, *Populist Property Law*, 49 CONN. L. REV. 933 (2017).

[388] *E.g.*, Mandy Dalugdug, *Sony Music Reveals 75,000 AI Deepfake Takedowns, Slams UK's 'Rushed' Copyright Plans*, MUSIC BUSINESS WORLDWIDE (Mar. 10, 2025), https://www.musicbusinessworldwide.com/sony-music-reveals-75000-ai-deepfake-takedowns-criticizes-uks-rushed-copyright-reform1.

[389] *E.g.*, Tim Ingham, *The AI Music Problem On Spotify (And Other Streaming Platforms) Is Worse Than You Think*, MUSIC BUSINESS WORLDWIDE (June 30, 2025), https://www.musicbusinessworldwide.com/the-ai-music-problem-on-spotify-and-other-streaming-platforms-is-worse-than-you-think; Eve Upton-Clark, *Is the Velvet Sundown an AI Band? Many on the Internet Sure Think So*, FAST COMPANY (Jul. 3, 2025), https://www.fastcompany.com/91362526/is-the-velvet-sundown-an-ai-band-many-on-the-internet-sure-think-so.

[390] *See Suryast*, *supra* note 306, at *1; Zarya, *supra* note 307, at *5 (allowing for registration of the text and compilation, but not AI-generated images as individual works); U.S. Copyright Office Review Board, Decision Affirming Refusal of Registration of A Recent Entrance to Paradise at *1 (Feb. 14, 2022), https://www.copyright.gov/rulings-filings/review-board/docs/A-Recent-Entrance-to-Paradise.pdf; Théâtre, *supra* note 307, at *1.

[391] 130 F.4th at 1045.

[392] *Id.* at 1041.

requirement of copyright."[393] At the same time, the D.C. Circuit made clear that the requirement's practical effect will be thin – it "does not impede the protection of works made *by* or *with* artificial intelligence."[394] The requirement comes down to nominally taking as an author "the person who created, operated, or used artificial intelligence—and not the machine itself."[395] The law's humanism is titular.[396]

1. Human Authorship and Statutory Interpretation

The circuit court in *Thaler* grounded its affirmation of the statutory requirement of human authorship in textual analysis and an inference that the Congress adopted the USCO's "longstanding interpretation" of authorship when passing the 1976 Act.[397] This was a strong interpretive nod to the Office's non-binding regulations, especially that the USCO had formally adopted the human authorship requirement three years prior to the Act's passing.[398] Thus, the court converted the statutory term of the "author" into one originating in the common law and in the Copyright Office itself, while claiming to use "traditional tools of statutory interpretation"[399] and apply the law "as written," rather than usurping the Congressional role of policymaking.[400] Such textualism is a well-recognized institutionalist strategy of the courts, often associated with the legal process jurisprudence, and famously employed in cases such as *Feist* and *CCNV*.[401] This allowed the *Thaler* court to avoid addressing constitutional arguments presented by both parties, the Congressional power to remove the statutory requirement of human authorship, and to foreclose questions regarding work for hire's constitutional legitimacy.[402] The copyright humanists' victory in *Thaler* was rather Pyrrhic.

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[393] 130 F.4th at 1044 (citing 687 F. Supp. 3d at 146).
[394] *Id.* at 1049 (emphasis added).
[395] *Id.*
[396] Matt Blaszczyk, *Thaler v. Perlmutter: Human Authors at the Center of Copyright?*, KLUWER COPYRIGHT BLOG (Apr. 8, 2025), https://copyrightblog.kluweriplaw.com/2025/04/08/thaler-v-perlmutter-human-authors-at-the-center-of-copyright.
[397] 130 F.4th at 1045.
[398] That said, given Barbara Ringer's involvement in the 1965 report and co-drafting of the 1976 with Abraham Kaminstein, this is not necessarily an inappropriate conclusion. *Cf.* Justin Hughes, *Restating Copyright Law's Originality Requirement*, 44 COLUM. J.L. & ARTS 383, 408-09 (2021) (criticizing deference to the USCO's human authorship requirement).
[399] 130 F.4th at 1045.
[400] *Id.* (citation omitted).
[401] *See* Balganesh, *supra* note 35, at 452 ("Textualism [is] a direct mechanism of institutional legitimacy."); *Legal Process*, *supra* note 179, at 1176.
[402] 130 F.4th at 1050 ("[E]ven if the human authorship requirement were at some point to stymy the creation of original work, that would be a policy argument for Congress to address."); *cf.* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 792 (2021) (describing "constitutional minimalism"); Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 IND. L.J. 5, 25 (2018) (criticizing "judicial minimalism").

The court found that many of the Act's provisions "make sense only" if an author is a human being, and so the best reading includes the requirement that "authors must be human, not machines."[403] In this respect, supposedly engaging in simple textual interpretation, the court found that:

1. Since copyright vests initially with the author, and copyright is a property right, an entity which cannot own property cannot be an author.[404] At this point, the court did not address authorship and ownership by entities which can own property, such as corporations.
2. Duration of copyright is limited to the author's lifespan.[405] The court found that statutory provisions for term duration which are explicitly not limited to the author's lifespan – for "95 years from the year of first publication" or "120 years from the year of its creation,"[406] – as exceptional[407] and actually reinforcing the human authorship requirement by virtue of approximating the length of human life.[408] This allowed Judge Millett to conclude that "of course," since "machines do not have 'lives," and their "length of…operability" is not "generally measured in the same terms as a human life," they can be distinguished from corporations.[409] It remains unclear, however, why corporate life corresponds more to humans' at this point.
3. While the Act's inheritance provision speaks of the author's "widow," "widower," "children," and "grandchildren," the court observes that machines "have no surviving spouse or heirs."[410] The court did not address the exclusion of works for hire from this section.[411]
4. Copyright transfers need to be in writing and signed, while machines "lack signatures" and the "legal capacity to provide an authenticating signature."[412] Here, the court did not address the section's provisions regarding transfer by operation of law or signature by "owner's duly authorized agent,"[413] nor did it explain why only humans can sign documents.

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[403] 130 F.4th at 1045.
[404] *Id.* (citing 17 U.S.C. § 201(a)).
[405] *Id.*; *see* 17 U.S.C. § 302(a)).
[406] 17 U.S.C. §§ 302 (c), (e).
[407] 130 F.4th at 1045 ("*[E]ven when* even when a corporation owns a copyright under the work-made-for-hire") (emphasis and alteration added).
[408] *Id.* („[T]he copyright endures for *the same amount* of time.") (emphasis added).
[409] *Id.*
[410] *Id.* (citing 17 U.S.C. § 203(a)(2), (A)).
[411] *See* 17 U.S.C.A. § 203 ("[O]ther than a work made for hire").
[412] 130 F.4th at 1046 (citing 17 U.S.C. § 204(a)).
[413] 17 U.S.C. § 204(a)).

5. Although unpublished works are protected "without regard to the nationality or domicile of the author," machines possess neither.[414] It is unclear why, according to the court, the statutory lack of regard to a particular quality entails that the quality must exist.
6. Joint works require authorial intent to merge contributions.[415] The court thus asserts that while "[a]uthors have intentions," machines "lack minds and do not intend anything."[416] This may be true, though it is unclear whether the analysis supports a requirement of human authorship. Corporations and other non-human legal persons are, after all, deemed to have intent requisite for joint authorship provisions. In fact, a work jointly authored by a non-human legal person is capable of constituting "a textbook example of a jointly-authored work in which the joint authors co-own the copyright;" such was the opinion of Judge Ginsburg sitting in the D.C. Circuit in *Reid.*[417]
7. Finally, the court rightly observed that "every time the Copyright Act discusses machines, the context indicates that machines are tools, not authors."[418]

The D.C. Circuit took these provisions to "collectively" identify, together with the Copyright Act's structure and design, that humanity is a "necessary condition" for authorship.[419] Preempting critiques of selective statutory reading, the court claims it engaged in a statutory "best reading," one reinforced by the last sixty years of USCO's reports and regulations, and the simple fact that the Act "makes no sense if an 'author' is not a human being."[420] Acknowledging that "[a]n author need not have children, nor a domicile, nor a conventional signature," and that historically women were deprived of ownership by coverture laws, the

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[414] 130 F.4th at 1046; *see* 17 U.S.C. § 104(a)).
[415] *Id.*; *see* 17 U.S.C. § 101.
[416] *Id.*
[417] Cmty. for Creative Non-Violence v. Reid, 846 F.2d 1485, 1497 (D.C. Cir. 1988). While the Supreme Court had "no occasion to pass judgment on the applicability of the Act's joint authorship provisions to this case," 490 U.S. at 753 n.32, the parties later agreed they were joint authors of some of the works at issue. Cmty. for Creative Non-Violence v. Reid, No. CIV. A. 86-1507(TPJ), 1991 WL 370138, at *1 (D.D.C. Oct. 16, 1991), order superseded, No. CIV. A. 86-1507(TPJ), 1991 WL 378209 (D.D.C. Oct. 29, 1991). While this is an uncommon scenario, neither the courts nor the Office object to works being jointly authored by corporations. *See* 16 Casa Duse, LLC v. Merkin, 791 F.3d 247, 257 (2d Cir. 2015) (citing Letter from Robert J. Kasunic, Assoc. Register of Copyrights and Dir. of Registration Policy and Practices, U.S. Copyright Office, to M. Cris Armenta, The Armenta Law Firm (Mar. 6, 2014)).
[418] 130 F.4th at 1046 (citing 17 U.S.C. §§ 101; 102(a); 108(c)(2); 109(b)(1)(B)(i); 116(d)(1); 117(a)(1), (c); 401(a); 1001(2), (3); 117(d)(1), (2)).
[419] 130 F.4th at 1046.
[420] *Id.* at 1048.

court makes a modestly humanist pronouncement.[421] Repeatedly underlining that a human is not a tool, the court makes clear its reading stems from statutory consistency, and not a Kantian ideal, carrying little practical effect.[422] If a corporation can be considered an author, and the author must be human, then the value accorded to humanity is nominal. It functions only at the level of narrative – it does not affect either non-human ownership or authorship of works.

2. Distinguishing the Work for Hire and the Constitution

According to the D.C. Circuit, recognizing corporations as authors does not conflict with the requirement of human authorship. The court supports this facially contradictory conclusion with a rather scholastic exegesis: the wording of the work for hire provision allows employers such as corporations to be "considered" authors, and this word does "critical work."[423] According to the court, the statutory text shows that "copyright and authorship protections" are merely "transfer[ed] instantaneously" to employers, and that Congress was "careful to avoid using the word 'author' by itself to cover non-human entities."[424] As indicated above, this seems at odds with precedent which takes corporations as "statutory authors," the legal understanding of the word "considered" (both in other dicta and elsewhere in *Thaler*), and doctrinal history.

The court's interpretation was explicitly rejected in the debates preceding the 1976 Act, when Register Abraham Kaminstein argued the Act should not designate the employer as an author and merely provide the "right to secure copyright" through an automatic assignment.[425] This proposal was not adopted i.a. due to concerns about American corporate interests abroad, and remains "contrary to the position taken by U.S. courts."[426] Indeed, the 1976 Act's solution has been criticized on humanist grounds by Ginsburg, writing it added "insult to injury" by "denominat[ing] the employer or hiring party, rather than the work's creator, the statutory 'author'"[427] The D.C. Circuit thus pronounced a

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[421] *Id.* at 1046.

[422] *See id.* at 1048 ("'[M]achine' would inconsistently mean both an author and a tool used by authors"); *id.* at 1045 ("[P]rovisions…identify authors as human beings and define 'machines' as tools used by humans in the creative process rather than as creators themselves.").

[423] 130 F.4th at 1048-49 (citing 17 U.S.C. § 201(b)).

[424] *Id.*

[425] 2 PATRY ON COPYRIGHT § 3:19 (citing REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87TH CONG., 1ST SESS. 87 (HOUSE COMM. PRINT 1961)).

[426] *Id.*

[427] Jane C. Ginsburg, *Fifty Years of U.S. Copyright: Toward A Law of Authors' Rights?*, 50 AIPLA Q.J. 635, 639 (2022).

fiction – which, arguably, had been untrue under the 1909 Act as well.[428] There, the Congress had made a deliberate choice to "label the employer an 'author,' rather than create a default rule of implied automatic assignment" as a matter of drafting ease, to ensure employers' entitlement to renewal not afforded to assignees, and also to avoid constitutional doubts regarding a "default rule of employer ownership stemming from the constitutional provision that Congress may give 'authors' a copyright.[429] At any rate, there is no support for the *Thaler* circuit's and district court's assertions that copyright under the 1976 – or 1909 Act – was "*unambiguously* limited to the works of human creators."[430]

The constitutional tension behind corporate authorship persists,[431] undoubtedly influencing *Thaler* court's decision to shy away from constitutionalist arguments.[432] The problem had already been pointed out in a dissent in *Scherr v. Universal Match Corp.*,[433] under the old statute. Judge Friendly opined that the reason for work for hire's "curiously back-handed" wording was "rather obvious" – the Constitution authorizes only legislation "securing 'authors' the exclusive right to their writings," and it is "quite doubtful that Congress could grant employers the exclusive right to the writings of employees regardless of the circumstances."[434] The dissent acknowledged Nimmer's implied assignment theory, which could make the work for hire provisions "constitutionally viable"[435] nonetheless opining that "any principle depriving [author] of copyright and vesting this in another without his express assent must thus be narrowly confined."[436] As already shown, however, Nimmer's and *Thaler*'s assignment theory is precisely opposite of the one Congress adopted to the same end of constitutional validation. In fact, a couple decades later, Judge Newman dismissed Friendly's dissent opining: "Though the United States is perhaps the only country that confers 'authorship' status on the employer of the creator of a work made for hire,

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[428] *See* BRACHA, *supra* note 36, at 132 (describing an analogous argument in 1909 Act debates made by Rober Johnson, who wished the employer be considered "proprietor," not "author").
[429] Fisk, *supra* note 118, at 62; BRACHA, *supra* note 36, at 135-6.
[430] 687 F. Supp. 3d at 147 (emphasis added).
[431] *See* Mark H. Jaffe, *Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC'Y. U.S.A. 139, 197 (2006); Roberta Rosenthal Kwall*, Authors in Disguise: Why the Visual Artist Rights Act Got It Wrong*, 2007 UTAH L. REV. 741, 749–50; Boyte, *supra* note 253, at 745 ("The Constitution…contemplates the alienation of ownership of specific rights granted under the law. But this does not mean that it permits the alienation of authorship through the fiction…"); BELLOS & MONTAGU*, supra* note 7, at 198 (calling the doctrine "hardly compatible with the [IP] clause"); Ginsburg, *supra* note 177, at 1090.
[432] 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.").
[433] 417 F.2d 497 (2d Cir. 1969).
[434] *Id.* at 506.
[435] *Id.*; *see also* 1 NIMMER ON COPYRIGHT § 1.06 (2025) (maintaining this view).
[436] *Id.*

its decision to do so is not constitutionally suspect."[437] While it would be naïve to expect a successful constitutional challenge to the work for hire,[438] it remains in continued tension with the Constitutional text, which, as Ginsburg observed, "supplies no grounding for it."[439] She makes a similar argument about the protectability of authorless works.[440]

This is not to say that robots can be authors, as they are not employees, at least for now.[441] However, as long as corporations are considered authors, there cannot be any meaningful requirement of human authorship, and it cannot be expected to prevent AI-assisted works' copyrightability as a substantive legal rule. Since the law already considers non-authors as authors, copyright may preserve the human authorship fiction in the AI era – even if the creators most proximate to the output make bare minimum contributions.[442] The D.C. Circuit's solution is thus a resort to the origin story – a glorified human creator, who fictitiously assigns the fruits of his (minimal) creativity to the employer – structuring and justifying the law.[443] This allows the court to dismiss "AI rights" advocates' constitutionalist arguments.[444]

Moreover, there is "no rule that says that anything of value should benefit from an IP right," which is a sweat of the brow logic rejected in *Feist*, in favor of a proximity-based approach.[445] In fact, advocates of AI output protectability sometimes go beyond even the "if value, then right" attitude, arguing that protection must be afforded for value to exist.[446] As unconvincing as this may be in principle, courts have been known to follow such logic in many "problematically expansive" copyright decisions,[447] while commentators expect a concentrated legislative effort

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[437] 945 F.2d at 506 n.5.
[438] Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 604 (1987).
[439] Ginsburg, *supra* note 177, at 1090.
[440] Ginsburg, *supra* note 31, at 166 ("If…the Constitution enshrines a humanistic vision of copyright, then protection of authorless outputs is not the province of copyright…").
[441] *See* Burk, *supra* note 299, at 301.
[442] *See* Lee, *supra* note 377, at 1535; Bridy, *supra* note 255.
[443] *See* Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319, 325-6 (2008).
[444] *E.g.*, Ioan-Radu Motoarcă, *AI, Copyright, and Pseudo Art*, 26 YALE J. L. & TECH. 430, 446, 552 (2024) ("What matters is who actually *is* the author, because only that entity can receive copyright protection [according to the] Constitutional Constraint…[I]f anyone should be given copyright protection for the work, it is the AI program."); *cf.* Ginsburg, *supra* note 31, at 166.
[445] Gervais, *Second-Degree*, *supra* note 33, at 1101; Ginsburg & Budiardjo, *supra* note 16, at 356.
[446] *See* Tim W. Dornis, *Artificial Creativity: Emergent Works and the Void in Current Copyright Doctrine*, 22 YALE J. L. & TECH. 1, 43 (2020) ("If AI creativity is considered to be useful… its output must be protected.").
[447] Alfred C. Yen, *Brief Thoughts About If Value Then Right*, 99 B.U. L. REV. 2479, 2480-81 (2019).

to create copyrights in AI-generated content.[448] In fact, the industry has already begun claiming ownership of AI-generated works through non-copyright means.[449]

3. Copyright's Humanist Purpose and Structure

Both AI and corporate authorship pose a challenge to humanist copyright both at the level of constitutional interpretation and theory, undermining the idea that copyright is to "serve creative authorship rather than noncreative labor."[450] *Thaler* conceals the issue citing *Google LLC v. Oracle Am., Inc.* for the proposition that copyright "incentivizes the creation of original works" not as a "special reward" but to prevent free riding and benefit the public.[451] Not only is *Google* infamous for evading copyrightability inquiry but allows courts to divert attention from case law which "celebrates the profit motive," recognizing it as the "engine that ensures the progress of science."[452] Such treatment of authorship, making it at once central and subdued to the public benefit, overshadows the holding's defense of the work for hire and openness to the copyrightability of AI-generated works – humanists like Ginsburg, call the former an "aberration," undermining the "humanist cast" and the "moral appeal" of copyright which flows from it, and argue that the latter should not be recognized.[453]

Conceptual and structural difficulties seen in AI-generated works are not new, however, and have burdened the law for a century in relation to the work for hire. Subsistence requirements of "creativity," "authorial originality," and the idea-expression dichotomy – all that *Sarony*, *Bleistein*, and *Feist* pronounce – are at odds with corporate authorship. After all, one cannot meaningfully judge the originality of a work, conceptualized in anthropocentric, cognitivist, causal language, if the author is a corporate entity. Or the intent required in joint works. As Ginsburg argues, even if the 1909 and 1976 Acts labeled the employer an author, rather than proprietor, to "cynical[ly] avoid "constitutional quibble with the subject of the initial vesting of rights," this exercise clashes with the *Sarony* holding that "that the constitutional term 'authors' carries a substantive meaning tied to intellectual creativity."[454] Further yet, corporate authorship undermines the expressive and

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[448] Lemley, *supra* note 15, at 208-09 ("Powerful players will push hard for someone…to own the output of generative AI. And they are likely to succeed...")

[449] *See* Kristelia García, *The Emperor's New Copyright*, 103 B.U. L. REV. 837, 852 (2023).

[450] Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUSTON L. REV. 613, 613 (2014); *see also* Ginsburg, *supra* note 177, at 1090 ("[T]he copyright clause does not design authors (creators) as mere…tools in furtherance of dissemination, to be tolerated only so long as that goal is achieved.").

[451] Eldred v. Ashcroft, 130 F.4th at 1042 (citation omitted).

[452] *Id.* at 212 n.18.

[453] Ginsburg, *supra* note 177, at 1091; *supra* note 31, at 167.

[454] Ginsburg, *supra* note 31, at 133-34.

communicative language in which the doctrine, statute, and scholars describe authorship, portraying the law as coherent and intertwined with private law at large.[455] Cynics, like Abbott, even claim "promoting human communication and socialization" are not the "normative goals…of the Constitution or Congress."[456] Alas.

In early twentieth century, the courts rejected arguments regarding work for hire's doctrinal contradictions – analogous to the ones regarding AI in *Thaler* – by claiming corporate works were original as a "result of the intellectual labor of the editors and compilers,"[457] who were anonymous even to the corporation, and even described corporations as "master minds."[458] A century later, scholarship explains that in works made for hire, the "claim of authorship is independent of any, and requires no creative expression on the part of the person or entity deemed to be the author. Because only original works of authorship are entitled to copyright, the originality and minimal creativity are provided by the employee or independent contractor."[459] Attempting to do away with this tension and strive for legal legitimacy of the § 201(b) framework, and of the moral and popular legitimacy associated with human-centrism, the court devised the fiction of the "author in the first instance" – of which the Act's text is silent.[460] Because of how minimal its content, the requirement of human authorship may even come to be sidestepped with a Congressional amendment – for ease.

4. Human Authorship's Uncertain Future

The D.C. Circuit's solution is akin to what classical logic calls the "principle of explosion" – from falsehood anything follows. Unsurprisingly, then, the court emphasized that the human authorship requirement will not affect the future of AI cultural production.[461] In fact, the court found the authorship requirement does not impede copyrightability of works made "*by* or *with*" AI and cited stakeholders who disagree with the USCO's AI registration decisions, putting into doubt whether there ordinarily exist works falling below this threshold.[462] Such "line-drawing" was "neither here nor there" because of Thaler's submissions, though the circuit court underlined that should the human authorship requirement become inconvenient, Congress may get rid of it

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[455] *See supra* note 215; Abraham Drassinower, *Authorship as Public Address: On the Specificity of Copyright vis-à-vis Patent and Trade-mark*, 2008 MICH. ST. L. REV. 199.
[456] Abbott & Rothman, *supra* note 259, at 1187.
[457] Edward Thompson Co., 119 F. 219.
[458] Schumacher v. Schewncke, 25 F. 466; *see* BRACHA, *supra* note 36, at 133-5.
[459] Dougherty, *supra* note 165, at 238.
[460] 130 F.4th at 1041; *see also* Brian L. Frye, *Literary Landlords in Plaguetime*, 10 NYU J. INTELL. PROP. & ENT. L. 225, 234-5 (2021) ("[C]opyright policy is justified primarily by moral intuitions about authorial ownership, based on social norms that developed in relation to economic interests").
[461] 130 F.4th at 1049.
[462] *Id.*

altogether. Drafting such narrow holdings is often described as "decision minimalism," a strategy aimed at minimizing the "sum total of decision costs and error costs as well as judicial interference with the political branches."[463] Finally, by preserving a nominal requirement of human authorship and dismissing any concerns about the constitutionality of the work for hire through a legal fiction, the court attempts to preserve legal, constitutional, and sociological legitimacy of the law.

Notably, the Circuit avoided standing on the wrong side of history regarding AI personhood, at once distancing itself from Thaler's advocacy for the rights of AI as "sentient being[s]" or a "new species,"[464] and from the Office's language of exclusion. Undoubtedly aware of reputational and risks involved in opining on personhood,[465] Judge Millet excludes AI authors as irresponsive to economic incentives. Acknowledging that both AI's sentience and, more importantly, sufficiency of incentives given by copyright may require revisiting, the court deferred to both the Congress and USCO.[466] The decision merges utilitarianism and modest anthropocentrism (which remains politically popular),[467] makes appropriate deference to legislative bodies, finally avoiding strong communitarian pronouncements. This signals an attempt of the court to avoid sacrificing its moral legitimacy for the sake of popularity, but also limitations of copyright law in providing non-economic visions of human identity and worth.[468]

Furthermore, even though the holding approaches the view of scholars such as Justin Hughes – who finds the requirement superfluous at best or unable to adapt to new entrants into the moral circle at worst[469] – it stops short. The *Thaler* court refused to admit that authorship is a "construct denoting merely the initial owner of all rights,"[470] the belief that modern

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[463] Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 839 (2022)

[464] *See* Matt Blaszczyk, *Impossibility of Artificial Inventors*, 16 UC L. SCI. & TECH. J. 73, 74 (2024) (quoting Thaler).

[465] *E.g.*, Miranda McGowan, *The Democratic Deficit of Dobbs*, 55 LOY. U. CHI. L. J. 91 (2023); Carol R. Goforth, *A Corporation Has No Soul-Modern Corporations, Corporate Governance, and Involvement in the Political Process*, 47 HOUS. L. REV. 617, 661 (2010).

[466] 130 F.4th at 1050.

[467] *E.g.*, Wesley J. Smith, *Vice President Vance Defends Human Exceptionalism at Munich*, NAT'L REV. (Feb. 16, 2025, 12:19 PM), https://www.nationalreview.com/corner/vice-president-vance-defends-human-exceptionalism-at-munich.

[468] *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1885-86 (1987) ("[T]o see the rhetoric of the market...as the sole rhetoric of human affairs is to foster an inferior conception of human flourishing."); *cf.* Anupam Chander & Madhavi Sunder, *Copyright's Cultural Turn*, 91 TEX. L. REV. 1397 (2013).

[469] *See* Hughes, *supra* note 398, at 408-09.

[470] 2 PATRY ON COPYRIGHT § 3:19 ("Romantic approach…has no relevance to copyright in the United States. Our cultural artifact of authorship for copyright purposes is commercial...").

law is able to do away with traditional justifications,[471] or a cynically realist argument which likens the search of coherence to "transcendental nonsense"[472] or – especially in copyright – "idioc[y]," as Mark Twain once wrote.[473] Instead, the court preserves the image of the law's local coherence,[474] of the judicial method as principled reasoning, and copyright's status as property, rather than guild monopoly.[475] As argued in Part III, the case allowed for the courts and the agency to seek institutional, popular, and legal legitimacy. Finally, the nothingburger requirement of human authorship, which will come to be tested further in *Allen*, is unlikely to stop AI-generated works' protection in light of the neutrality principle and political pressures.

C. Allen v. Perlmutter

Although human-only authorship has been judicially affirmed as a formality, its substantive reach will be tested in Jason Allen's appeal from the USCO's refusal to register his award-winning *Théâtre d'Opéra Spatial*.[476] Unlike Thaler, Allen embraces the human authorship requirement both legally and rhetorically. He presents himself as the work's author, and advocates for recognition of the "human element behind AI-generated content," stylizing the lawsuit as a fight for "expressive rights of AI-assisted artists."[477] This is an old strategy of employing humanist rhetoric to extend copyright protection to new kinds of subject matter[478] and "sway decisionmakers."[479] And it may succeed again.

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[471] *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 125 (2005) (arguing that modern capitalism and bureaucracies do not require "spiritual" legitimation.).
[472] Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).
[473] MARK TWAIN'S NOTEBOOK: THE COMPLETE WORKS OF MARK TWAIN 381 (1935) ("Whenever a copyright law is to be made or altered, then the idiots assemble.").
[474] *See* Joseph Raz, *The Relevance of Coherence*, *in* ETHICS IN THE PUBLIC DOMAIN 277, 301 (1995).
[475] *See* Shyamkrishna Balganesh, *The Judicial Method in Copyright*, 71 J. COPYRIGHT SOC'Y U.S.A. 1, 20 (2024).
[476] Kevin Roose, *An A.I.-Generated Picture Won an Art Prize. Artists Aren't Happy*, N.Y.T. (Sept. 2, 2022), https://www.nytimes.com/2022/09/02/technology/ai-artificial-intelligence-artists.html.
[477] Jason M. Allen, *The COVER Protest: Copyright Obstruction Violates Expressive Rights*, ART INCARNATE (Mar. 23, 2023), https://artincarnate.com/cover-protest-statement.
[478] *See* Jaszi, *supra* note 189, at 480.
[479] *See* Lemley, *supra* note 15, at 894.

Fig. 1. *Théâtre d'Opéra Spatial* by Jason Allen.

1. Creative Process

In his complaint, Allen represented having engaged in an elaborate, iterative process, using the Midjourney to create the artwork through a "tedious, complicated, and often frustrating endeavor," requiring "more than the bare minimal mental effort."[480] Allen first provided detailed prompts with big picture depictions, specified the genre, style, and era of the work, using a prompt writing technique he developed.[481] Next, he reviewed the outputs and edited the prompts, repeating the process six hundred twenty-four times,"[482] spending one hundred fourteen hours.[483] Subsequently, he made further edits with Gigapixel AI and Adobe Photoshop, transforming raw outputs into the final work.[484] Finally, Allen refused to disclaim any AI-generated material before the USCO, which would have likely registered the work as a compilation,[485] leading the Board to reject his application as non-compliant with the disclosure requirement.

2. The New *Catalda*?

Appealing the Office's decision, Allen roots his argument in principles of copyright subsistence, an allegation of aesthetic

[480] Théâtre, *supra* note 307, at 6.
[481] *Id.* at 6.
[482] *Allen*, Complaint, *supra* note 30, at *5-6.
[483] *Id.* at 9.
[484] *Id.* at 10.
[485] Théâtre, *supra* note 307, at *1.

discrimination,[486] and humanist rhetoric. The case allows Ryan Abbott, Allen's lawyer, to reframe the arguments made in *Thaler* and in scholarship. Instead of employing analogies to first possession and common law property rights,[487] Allen's case is supported by copyright principles to a much greater extent. As shown in Part I, copyright law does not require a significant degree of originality. It never has, at least in modern times, and that has been part of its claim to legitimacy as an engine of democracy and the market.[488]

While originality is a causal requirement, courts may not follow the humanists' insistence on a sophisticated volitional inquiry,[489] especially in Allen's case which involves an iterative, complex process, and allegations of aesthetic discrimination. In fact, district courts may end up dismissing the USCO's and scholars' insistence that prompt-based works' conflict with the idea-expression dichotomy, especially without Supreme Court guidance.[490]

Indeed, authorship's nominal humanism – which Barton Beebe thought would become an "important backstop" against commodification and allow for a return to a "human-subject-focused copyright regime" – has already been reduced to a formality in *Thaler*, just like personality had been after *Bleistein*.[491] Whether it will happen at all, and if in *Allen*, remains to be seen. There is a real risk, however, that if *Thaler* turns out to be the AI-era's *Bleistein*, *Allen* may be the new *Catalda*.

3. Cui Bono?

The extension of copyright to AI-generated works in *Allen* may thus end up benefiting corporations the most, and to do so in a doctrinally orthodox way. It will likely "over-reward[] the programmer, particularly in light of the fact that the programmer is no more able to anticipate the output than anyone else."[492] One may add, the programmer will typically work on a work-for-hire contract for a corporate entity. However, this is

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[486] *Allen*, Complaint, *supra* note 30, at *35 (claiming the Board paid undue consideration to "the controversy surrounding his winning the Colorado Fine Arts contest, which suggests a desire to punish…Allen for using a technology that the Office finds distasteful.").

[487] *See* Abbott & Rothman, *supra* note 259, at 1196-99; *cf.* 130 F.4th at 1042 ("Copyright Act preempts state common law copyright protection"); 687 F. Supp. 3d at 150; *see also* Blaszczyk, *supra* note 464, at 81–82 ("[A]ttempts to support an 'if value, then right' approach through custom or common law are no less misguided now than they were centuries ago").

[488] *See* Beebe, *supra* note 86, at 375; *cf.* BRACHA, *supra* note 36, at 72-93.

[489] *Cf.* Gervais, *Machine*, *supra* note 33, at 2103; Boyden, *supra* note 139, at 394 ("The test for authorship should be whether the putative author foreseeably communicated that meaning to the audience."); *but see e.g.*, Richard H. Chused, *Randomness, AI Art, and Copyright*, 40 CARDOZO ARTS & ENT. L.J. 621, 653–54 (2023).

[490] *See* Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555 (2021).

[491] *See* Beebe, *supra* note 86, at 383 n.351; *cf.* Ginsburg, *supra* note 31, at 111.

[492] Samuelson, *supra* note 15, at 1208.

not an "aberration" of the doctrine, but the way it has operated in practice, following the principles of creative control, which have first privileged some humans (directors) over others (actors), and then humans' primordial assignees (corporations) over anyone else. Constitutionalists similarly argue that the work for hire-created "unfairness in labor relations is not what triggers Intellectual Property Clause scrutiny," and regardless a challenge would be, realistically, pointless.[493] At the same time, it is difficult to see how the copyright enterprise continues if it excludes all AI-assisted creativity. To be analytically airtight, the exclusion would need to extend to all AI tools, from those used in smartphone cameras through professional music production. It would entail a reversal of the default position: nothing is copyrightable unless proven otherwise. And that is not how the law has operated since inception.

In this sense, Abbott is right to point out what critical copyright scholars have long argued. Copyright "plays very little role in motivating creative work" and instead its "purpose… is to enable the provision of capital and organization so that creative work may be exploited."[494] For legal, moral, and political legitimacy reasons, this the Copyright Office and the courts cannot admit. Instead, Part III argues, at the time of copyright's legitimacy crisis, the institutions resort to the rhetoric of human authorship, which is a new incarnation of the romantic authorship ideology.

III. COPYRIGHT HUMANISM AT A TIME OF CRISIS

A. Legitimacy Crisis

The USCO, the *Thaler* courts, and humanist scholars, have presented the commitment to human authorship as copyright's lodestar despite corporations reaping the benefits of copyright law for well over a century, and the doctrinal minimalism which renders much of the human authorship requirement futile, shows how little the law has cared about "creativity" as such.[495] This comes at a time when the conceptual tensions within copyright are pushed to their limit, the discrimination behind formally neutral doctrines becomes ever more visible, stakeholders have been able to enforce their rights using expansive and novel theories, while infringement on the internet has nonetheless proliferated.[496] Thus, the ability to tell a convincing morality tale about the doctrine has been put

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[493] 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, 1191 (2000).
[494] Julie E. Cohen, *Copyright As Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141 (2011)
[495] *See* Frye, *supra* note 121.
[496] *See* Ben Depoorter et al., *Copyright Backlash*, 84 SOUTH CAL. L. REV. 1251 (2011).

into doubt; and so has copyright's coherence and the value of the doctrinal method.[497]

Instead of taking a critical look at itself, minimalist concepts of protectability and the history of lobbying behind copyright expansion,[498] or answering the long-overdue questions of whether copyright is up to the task of providing economic incentives in the digital era, humanist copyright doubles down on formalism, claiming that exclusion of "AI-generated" production will save human authors and good art in the era of costless slop. This is an empty promise: copyright has long allowed to protect the most vulgar and banal of works, with originality and authorship being depleted of much substantive content, compounded by the principle of aesthetic neutrality and lack of regard to the amount of expense or effort paid by the author.[499] And yet, institutions are likely to continue pretending otherwise.[500]

The Office asserts that if "authors cannot make a living from their craft, they are likely to produce fewer work."[501] Meanwhile human authors had not been getting paid before Chat GPT became a thing. Empirical research indicates that both demand and profits are distributed unequally, in an L-curve, and "most of what copyright does is enrich the one percent."[502] Moreover, due to the changes in the economy, copyright gets authors paid less than ever before.[503] A recent study shows that most professional creators – television actors, musicians, game developers – simply cannot count on copyright to provide economic security.[504] The problem does not lie mainly in superstar artists, but publishers and digital-era's "copyright aggregators," who generate most profits and have rules tailored to them.[505] This leads some to argue that copyright is "neither apposite nor equipped" to deal with the problem of generative AI,[506] with

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[497] *See supra* note 180.
[498] *E.g.*, William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139, 141 (1996).
[499] *See* Bracha, *supra* note 36, at 208-09 ("Copyright…place[s] originality at the heart of the field, awarding it a privileged status, while, at the same time, reducing [its] reach…to negligible dimensions.").
[500] *E.g.*, Kadrey v. Meta, 3:23-cv-03417-VC, at *1-2.
[501] USCO, COPYRIGHTABILITY, *supra* note 39, at 37.
[502] Glynn S. Lunney, Jr., *Copyright and the 1%*, 23 STAN. TECH. L. REV. 1, 7 (2020).
[503] Peter DiCola, *Centering Creators: The New Economics of Copyright and Alternative Policies for Creative Labor*, 2025 U. ILL. L. REV. 223, 226 (2025); Rebecca Giblin, *A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid*, 41 COLUM. J.L. & ARTS 369, 389 (2019).
[504] DiCola, *supra* note 503, at 226.
[505] *Id.* at 230 ("[L]egislators have always geared copyright toward copyright aggregators like publishers rather than creators. It was this way with the first modern copyright statute in England, and has continued through the digital era."); Giblin, *supra* note 465, at 390-394 (analyzing how authors' and publishers' interests diverge in the publishing sector).
[506] Craig, *supra* note 15, at *5; *see* Bracha, *supra* note 44.

scholars proposing a variety of non-copyright based solutions.[507] As a result, copyright is at risk of appearing "neither fair, efficient, nor just."[508] Against this empirical background – regardless if one thinks these outcomes are worrying or not – the USCO insistence that it is the "proliferation of AI-generated content on streaming services" which affects creators' ability to get paid is unpersuasive.[509] Most human authors did not make any money on streaming platforms in the first place.

Copyright has also had a rough time with the public. Since the beginning of the internet, cynicism toward copyright has spread widely, sometimes increasing together with knowledge of copyright law.[510] Aggressive litigation tactics against infringing users – ordinary people – have turned many against copyright law, and the early 21st Century saw a development of filesharing and piracy-oriented communities and even political parties.[511] In the last couple of decades, at times legislative changes were perceived so unjust, and led to so many protests, as to be repealed: such was the fate of the amendment applying work for hire doctrine to sound recordings, which would have deprivileged musicians at the expense of studios.[512]

While popular discontent is problematic for law at large, it is especially difficult for copyright, which "cannot survive unless it is accorded widespread acquiescence."[513] Furthermore, copyright relies "heavily for its operation on widespread acceptance of its legitimacy," which lies in the "idea" that copyright promotes cultural flourishing, by giving the weight of law to ideas that artistic and cultural activities warrant recognition, respect and reward."[514] It is thus imperative that

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[507] *See* Craig, *supra* note 15, at *28-29; Mantegna, *supra* note 1415 BJ Ard, *Copyright's Latent Space: Generative AI and the Limits of Fair Use*, 110 CORNELL L. REV. (2025), at *68, https://ssrn.com/abstract=4630085; Rachel Landy, *Did Copyright Fail Music Artists?*, 105 B.U. L. REV. (forthcoming 2025) https://ssrn.com/abstract=5241841.

[508] Lunney, *supra* note 502, at 4.

[509] USCO, COPYRIGHTABILITY, *supra* note 39, at 37.

[510] Lee Edwards et al., '*Isn't it just a way to protect Walt Disney's rights?': Media user perspectives on copyright*, 17 N. MEDIA & SOC'Y 691, 701-02 (2015).

[511] *See* Depoorter, *supra* note 496, at 1263; *see also* Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 661-65 (2006).

[512] Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 375-76 (2002) ("When outraged musicians and scholars discovered that, virtually overnight, the substantive law of copyright had undergone this dramatic change, the reaction was swift, loud, and overwhelmingly disapproving. Reeling from the bad press, Congress held a brief hearing and retroactively repealed the amendment.")

[513] David Lange, *Reimagining The Public Domain,* 66 LAW & CONTEMP. PROBS. 471 (2003); *See* Brett Lunceford & Shane Lunceford, *Meh. The Irrelevance of Copyright in the Public Mind*, 7 NW. J. TECH. & INTELL. PROP. 33 (2008); Giancarlo F. Frosio, *Resisting the Resistance: Resisting Copyright and Promoting Alternatives*, 23 RICH. J.L. & TECH. 1, 11-12 (2017).

[514] Bently & Biron, *supra* note 233, at 263; *see also* Fromer, *supra* note 25, at 1781 ("[T]he law ought to institutionalize the norms people have…to bolster…enforceability

members of society "feel a reasonable correspondence between the social norms that underpin their practices and legal norms embodied in copyright law."[515] After all, copyright's very point is to operate through behavioral response, both in terms of providing an incentive to create, which provides a legal and moral justification for the law's existence; and for compliance, given the ease of copying and costliness of enforcement. It is simply impossible to sue everyone.[516]

While punitive tactics prove counterproductive since they increase public backlash over a law perceived as unjust,[517] copyright discourse has responded through rhetorical strategies articulating grounds for copyright legislation and enforcement.[518] Charged metaphors have been used in legal and legislative debates by stakeholders attempting to influence legal development and by the public institutions and industry seeking to ensure public compliance by generating social norms.[519] Arguments embody conceptions of what is legally sound, morally right, and economically expedient, in turn involving a broader claim to public legitimacy, and an appeal to the popular sentiment.[520] The recent turn to human authors – the "people" – attempts to displace the figures of lobbyists and corporations from public perception and the law's symbols.[521] To say that humanism is symbolic is not to say it lacks importance: rather, it is an intertwining of the legal doctrine with rhetoric which plays a legitimizing function.[522] However, not only does the humanist turn defend the institution of copyright, but it also defends doctrinal interpretations, conceptions of copyright, distributive outcomes, and institutional actors.

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and legitimacy…[W]hen the law does not accord with people's norms, the law's credibility might be undermined.").

[515] Bently & Biron, *supra* note 233, at 263.

[516] Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 FLA. L. REV. 261, 262-23 (2014).

[517] Depoorter, *supra* note 496, at 1269, 1289 ("Sanctions…can backfire and increase anti-copyright sentiments among file sharers."); *see also* Peter S. Menell, *Infringement Conflation*, 64 STAN. L. REV. 1551, 1578 (2012) ("The recording industry has come to recognize that mass enforcement is causing more harm to its business than good under current circumstances.").

[518] *Id.* at 1289 ("[L]imitations of deterrence-based approaches increase the importance of fostering social attitudes that support the rights of copyright holders").

[519] RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695–1775) 8 (2004).

[520] Lee Edwards et al., *Discourse, justification and critique: towards a legitimate digital copyright regime?*, 21 INT. J. CULT. POL'Y 60, 61 (2015) (applying sociological theories of justification and capitalism to copyright discourse).

[521] Michael C. McGee, *In Search of 'the People': A Rhetorical Alternative*, 61 QUARTERLY JOURNAL OF SPEECH 235 (1975).

[522] *See* Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983) ("[L]aw and narrative are inseparably related."); *see also* LOUIS ALTHUSSER, ON IDEOLOGY 19 (2020).

B. Turn to Rhetoric

Critical discourse scholarship points out that rhetorical strategies are deployed especially during periods of change, when established institutions and interest groups need to respond to the new dynamic by reasserting the old political-economic distribution through narrative.[523] It is thus unsurprising that the Office claims that the "society would be poorer if the sparks of human creativity become fewer or dimmer,"[524] while the *Thaler* district court pronounced that:

> Human involvement in, and ultimate creative control over, the work [is] key to the conclusion that the new type of work [falls] within the bounds of copyright. Copyright has never stretched so far, however, as to protect works generated by new forms of technology operating absent any guiding human hand…Human authorship is a bedrock requirement of copyright.[525]

In fact, this mirrors the movements that that copyright discourse made in the era of *Bleistein*, when "[a]uthorship in its ideological form was mobilized to justify the very rule that turned creators into nonowner, wage laborers."[526] In the copyright discourse, "the heroic creator of original intellectual works and as their rightful owner [] looms large,"[527] despite the work for hire and other mechanisms reducing the authors' rights narrative to a symbol. It is thus helpful to see that just like in the 2020s, so a century before, authorship's function is ideological, reduced to a "declaratory layer of rhetoric."[528]

While the law's use of rhetoric is understandable, it is not necessarily morally legitimate, often being purely instrumental. Rightsholders have long used authorial, creativity rhetoric to "seize rhetorical advantages not otherwise available."[529] Industries often employ a "grandiose rhetoric,"[530] emphasizing the "talents and efforts of authors," finding success both in Congress and the courts.[531] Metaphors have been used to both legitimize the status of copyrights as property rights and instill discipline, with

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[523] *See* Edwards et al., *supra* note X, at 62; *see generally* FAIRCLOUGH, *supra* note X.
[524] USCO, COPYRIGHTABILITY, *supra* note 39, at 34.
[525] Thaler v. Perlmutter, 687 F. Supp. 3d 140, 146 (D.D.C. 2023).
[526] BRACHA, *supra* note 36, at 133; *see also* ROSEMARY J. Coombe, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW 219-220 (1998); *id.* at 283 ("Romantic ideologies of authorship justify copyright protection and the commodification of cultural texts").
[527] Bracha, *supra* note 36, at 188.
[528] *Id.* at 266-7, 276.
[529] Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417, 420 (2005).
[530] Neil Weinstock Netanel, *Impose A Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 24 (2003); *see id.* at 22 ("[C]opyright industries regularly employ the rhetoric of private property to support their lobbying efforts and litigation").
[531] Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1248 (1996).

lawyers and lobbyists comparing infringement to theft,[532] piracy,[533] or trespass.[534] However, in order to win over the public, rather than vilify it, institutions have shifted to education campaigns and authorial rhetoric.

In the digital era, both the industry and public institutions have commenced numerous public-facing campaigns attempting to reassert the popular legitimacy of copyright,[535] releasing advertisements with slogans comparing infringement to theft, and introducing anti-piracy curricula to schools.[536] International campaigns aimed at children presented copyright as a natural right of the author,[537] undermined the difference between property rights in tangibles and IP,[538] employed the creativity rhetoric, minimizing the role of corporate ownership,[539] and used the "starving artist" narrative of harm.[540]

They continue a long history of blending personality and commodity metaphors in the doctrine's "creativity rhetoric" which has "assimilate[d] even very mundane commodities to the privileged language of

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[532] *See* Peter K. Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VAND. J. ENT. & TECH. L. 881, 882 (2011).

[533] Patricia Loughlan, *'You Wouldn't Steal a Car': Intellectual Property and the Language of Theft*, 29 EUR. INTELL. PROP. REV. 401, 401 (2007); *Pirates, Parasites, Reapers, Sowers, Fruits, Foxes...The Metaphors of Intellectual Property*, 28 SYDNEY L. REV. 211 (2006).

[534] Michael A. Carrier, *Cabining Intellectual Property Through A Property Paradigm*, 54 DUKE L.J. 1, 25 (2004) ("[T]he center of the rhetoric and imagery are images of landowners defending their land against trespassers and of lone inventors plugging away in their basements to obtain the reward of exclusion."); *see also* Tom W. Bell, *Authors' Welfare: Copyright As A Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 273 (2003); *cf.* Fagundes, *supra* note 19, at 659.

[535] In addition to legal scholars, this question has been explored in critical media studies literature on copyright. Majid Yar, *The Rhetorics and Myths of 'Anti-Piracy' Campaigns: Criminalisation, Moral Pedagogy and Capitalist Property Relations in the Classroom*, 10 NEW MEDIA & SOCIETY 605, 610 (2008) ("[R]hetorical performances can be seen as attempts to establish effectively the legitimacy of a given point of view, set of claims or assertions of rights, entitlements and responsibilities"); Lee Edwards, et al., *Framing the Consumer: Copyright Regulation and the Public*, 19 CONVERGENCE 9, 13 (2012) (analyzing copyright legitimacy seeking in discourses generated by groups of stakeholders from the government, industries, to creative workers, and ordinary users). Both Edwards and Yar rely on the concept of "repertoires of justification" found in LUC BOLTANSKI & LAURENT THÉVENOT, ON JUSTIFICATION: ECONOMIES OF WORTH (Catherine Porter trans., 2006).

[536] Yar, *supra* note X, at 610 (analyzing campaigns the of the Copyright Society of America, the Software & Information Industry Association, and the Business Software Alliance); *see also* Tarleton Gillespie, *Characterizing Copyright in the Classroom: The Cultural Work of Antipiracy Campaigns*, 2 COMMUNICATION, CULTURE AND CRITIQUE 274 (2009); Suzannah Mirghani, *The War on Piracy: Analyzing the Discursive Battles with all of Corporate and Government Sponsored Antipiracy Media Campaigns*, 28 CRITICAL STUDIES IN MEDIA COMMUNICATION 113 (2010).

[537] *Id.* at 610-11.

[538] *Id.* at 612.

[539] *Id.* at 613-4 ("All the programmes [sic] considered here make repeated reference to individualized notions of creative production, using terms such as 'author' …").

[540] *Id.* at 615.

creativity."[541] Indeed, the recent humanist turn allows the USCO and the courts to create a sense of nostalgia for a time before the machines took over, when copyright and humanism prevailed, fulfilling the promises of the constitution and the Enlightenment. Such time, however, never was.[542] It serves to naturalize the law as genuine or necessary, quite like theories of original acquisition in property law.[543]

Further yet, the trope of the romantic author has "served to bolster the property rights claims of the powerful."[544] Much of the power of humanist doctrines lies not in their ability to explain the nuances of the law.[545] Rather, the concept forms "the basis for the public appeal for the expansion of intellectual property rights,"[546] even though the law is "heavily skewed to protect the interests of corporations, not individual authors."[547]

Such strategies at sociological legitimacy may be seen as approaching propaganda and lacking in moral legitimacy, however useful they are for institutional manufacture of consent.[548] Indeed, this critique may be extended not only to copyright, but also other doctrines, including corporate law, ridden with romantic and personality metaphors, which have proven instrumental in legitimizing corporate rights legally, morally, and sociologically.[549] Similarly, contract law has undergone a change from the blackacre, through the contract of adhesion, to the boilerplate, all veiled by freedom of contract metaphors, nominal humanism, and relative inattention to the parties bargaining strength.[550] Copyright scholars observe similar analogies in all nominally egalitarian

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[541] Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 3, 6-10 (2002) (copyright's metaphors "contributed to the tendency to think about copyrights as permanent and absolute property rights").

[542] *See* KARL MARX, GRUNDRISSE: NOTEBOOK I – THE CHAPTER ON MONEY at ("The bourgeois viewpoint has never advanced beyond this antithesis between itself and this romantic viewpoint…").

[543] *See* Oren Bracha, *The History of Intellectual Property as the History of Capitalism*, 71 CASE W. RES. L. REV. 547, 556 (2020); Rose, *supra* note 104.

[544] Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1335 (2004).

[545] *See* Lemley, *supra* note 15, at 886; Jaszi, *supra* note 144, at 320.

[546] Chander & Sunder, *supra* note 544, at 1139 n.39

[547] Lemley, *supra* note 15, at 882; *see also* Jaszi, *supra* note 189, at 297 ("[D]istributors have reaped most of the benefits of copyright's cultivation of Romantic 'authorship.'").

[548] *See* Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J.L. & PUB. POL'Y 287, 339 (2020) ("In the absence of good reasons, sociological legitimacy must be sustained by propaganda and deception–and there may well be limits to the ability of these techniques to sustain legitimacy over time."); *see also* Ekow N. Yankah, *Legal Hypocrisy*, 32 RATIO JURIS 2, 14-18 (2019) (discussing dangers of legal hypocrisy).

[549] Malla Pollack, *The Romantic Corporation: Trademark, Trust, and Tyranny*, 42 U. BALT. L. REV. 81, 82 (2012) (analyzing the "myth of the romantic corporation" in trademark law).

[550] *See* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2012).

doctrines.[551] Others, go even further: continental "anti-humanists" criticize the use of rhetoric anthropomorphizing political power as the will of the governed,[552] and object to the supposed emptiness rights-talk, whose recognition of everyone's abstract humanity is on the one hand a great achievement, and the other uncoupled from concern over distributive effects, which undermines the claim to moral legitimacy.[553] It seems that presenting "[a]uthor's [r]ights as [h]uman [r]ights," despite the best intentions, may be prone to similar critiques.[554] Before turning to the moral assessment of the humanist rhetoric, the Article clarifies its role as an institutional strategy.

C. Institutionalism and Human Authorship

1. The Courts

The D.C. Circuit in *Thaler* clearly engaged in what Balganesh calls the "institutionalist turn" in copyright jurisprudence, that is an avoidance of substantive issues, a strong facial deference to Congress and the Constitution, and a heightened concern with the "competence and legitimacy of the Court within the copyright system."[555] This allows to divert attention from the "polarizing justificatory debates" over substantive copyright law,[556] and take both "legitimacy and public credibility" as "important normative considerations" influencing substantive work of the courts.[557] By invoking copyright's utilitarianism, the court's underscored the importance of both the law and the judges to the public welfare, giving copyright "the aura of an uncontested dogma," or even of "public law in disguise."[558] This aims as much at preserving the law's legitimacy as the court's own.

The *Thaler* court at once attempts to preserve copyright's structural soundness and is aware that structure may be amended in Congress due to the demands of industry. In other words, *Thaler*

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[551] Boyle, *supra* note 36, at 1461 (copyright "presents exactly the same problems as the liberal conception of property generally").
[552] *See* Michael C. Behrent, *Liberalism Without Humanism: Michel Foucault and the Free-Market Creed, 1976–1979*, 6 MODERN INTELLECTUAL HISTORY 539, 545 (2009)
[553] Costas Douzinas, *The Poverty of (Rights) Jurisprudence*, *in* THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 56, 68-73 (Conor Gearty & Costas Douzinas eds., 2012).
[554] *See* Gervais, *Machine*, *supra* note 33, at 2079-80; *cf.* Cristophe Geiger, *Elaborating a Human Rights-Friendly Copyright Framework for Generative*, 55 IIC 1129, 1129 (2024) (arguing more moderately that copyright in AI-aided production complies with human rights only if it ultimately aids humans and their creativity, recognizing that "AI systems are here to stay, and their development should not be inhibited, as they can have many beneficial aspects (including for creators)").
[555] Balganesh, *supra* note 35, at 422.
[556] *Id.* at 423.
[557] *Id.* at 437.
[558] Balganesh, *Legal Process*, *supra* note 216, at 1113, 1180.

expresses a functionalist view of the law: while legal and social norms are separate, the latter will not be constrained by minimal constraints of the former, and should the law become too cumbersome, the Judge expects it will be lobbied away.[559] At the same time, both the USCO and the D.C. Circuit appear convinced that the law's relative autonomy does, and should, maintain the social belief in the polity of authors, rather than passive consumers of content produced by corporations or robots.[560] By implying into the statute the privileged status of the human being – the sole author of works and social narratives – the court and agency maintain the foundational belief of copyright and liberal democracy.[561]

Doctrinal and constitutional constraints make the dictum rather modest. First, the court disclaims discriminating against AI-generated works in the vein of dicta preceding *Bleistein* (and so does the USCO, if less convincingly).[562] Secondly, for the court and the agency, an author is a human because only a human responds to economic incentives, and a machine does not. Thirdly, copyright reflects the anthropocentric "attitude that human beings are outsiders to nature," known from property law, which "gives the earth and its creatures over to those who mark them so clearly as to transform them,"[563] preserved by the court and the Office. Finally, *Thaler*'s discussion implies that since a human is an author who consensually assigns his authorship to his employer, no injustice takes place in the work for hire scenario. In these ways, the institutions affirm the law's ideology, i.e., both the form of authorship in law and the liberal political order. Not only is this how institutions strive for legal legitimacy,[564] but also how the courts respond to crises – by reasserting grand, often originalist-looking theories, such as human authorship.[565] Furthermore, given how narrow the holding is, it does not conflict with the principle of neutrality, and preserves the court's and the law's legal legitimacy – while shedding doubt on the Office's position. Finally, by legitimizing the copyright as centered on human authors, it strengthens the claims that the law and rightsholders make on users.

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[559] *See* Christopher Tomlins, *How Autonomous Is Law?*, 3 ANN. REV. L. & SOC. SCI. 45, 57 (2007).

[560] *Id.* Compare the USCO's language of "sparks of human creativity" and "enlightening content" with long-standing critiques of the culture industry. Theodor W. Adorno, *Culture Industry Reconsidered*, NEW GERMAN CRITIQUE 12-19 (1975).

[561] Tomlins, *supra* note 559, at 56 (describing Willaim E. Forbath's view of law's "independent power to shape social life").

[562] *See* Théâtre, *supra* note 307.

[563] Rose, *supra* note 104, at 88.

[564] *See* Rafał Mańko, *Legal Form, Ideology and the Political*, *in* LEGAL SCHOLARSHIP AND THE POLITICAL: IN SEARCH OF A NEW PARADIGM 17, 17 (Adam Sulikowski et al. eds., 2020) ("[T]he juridical serves to reproduce and propagate two distinct ideologies – the currently hegemonic political ideology…and the residual ideology of the juridical…which is in fact the ideology of the legal form as such").

[565] *See* TUSHNET, *supra* note 105, at 4 ("The crisis of grand theory is the form that the failure of liberal political theory has taken in constitutional law.").

2. The U.S. Copyright Office

The USCO's recognition of the human authorship requirement should be read through legitimacy and institutionalist lenses. Firstly, the Office's copyrightability report was preceded by an extensive public consultation, resulting in 10, 000 comments, meetings, webinars, and listening sessions, addressing the widely acknowledged public participation deficit in copyright policymaking,[566] and putting the "sleepy" USCO in the public spotlight.[567] Arguably, the public-facing consultation meant to rectify the doubts concerning a lack of a notice-and-comment period behind the 2023 *Guidance*.[568] It also increases the appearance of moral authority of the report's findings, portraying them as democratic, even though the publication addresses and sides with some commentators and not others.[569]

Secondly, the USCO's Office's humanist rhetoric has found appeal with many commentators[570] and the public at large. Apparently, most public responses to the consultation have expressed a negative sentiment towards AI,[571] which mirrors the broader trend of people simultaneously adopting AI, consuming AI-generated content, and expressing discontent with the technology and its effects.[572] More broadly, humanist rhetoric continues the Office's perennial employment of author-centric language, and gradual increase in public-facing publications and initiatives. A former register once even remarked that copyright "is for the author first

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[566] *See* Christopher Jensen, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531, 541 (2003) ("The process of drafting copyright legislation often amounts to little more than negotiations among narrow interest groups; without a seat at the bargaining table, the public has no meaningful opportunity to participate in the legislative process").

[567] Cecilia Kang, *The Sleepy Copyright Office in the Middle of a High-Stakes Clash Over A.I.*, N.Y. TIMES (Jan. 25, 2024), https://www.nytimes.com/2024/01/25/technology/ai-copyright-office-law.html.

[568] *See* Lee, *supra* note 359, at 9.

[569] *See e.g.*, Annemarie Bridy, *Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA*, 30 CARDOZO ARTS & ENT. L.J. 153 (2012) (applying Habermas' discourse theory of procedural democracy to copyright policymaking).

[570] *E.g.*, Ratib Ali, *The U.S. Copyright Office, GenAI, and the Advancement of Culture*, IPWATCHDOG (Mar. 10, 2025, 7:15 AM), https://ipwatchdog.com/2025/03/10/u-s-copyright-office-genai-advancement-culture/id=186931.

[571] Kirti Gupta & Elias Ilin, *Using AI to Analyze the Sentiment of Public Comments on AI and Copyright*, IPWATCHDOG (May 1, 2025, 12:15 PM), https://ipwatchdog.com/2025/05/01/using-ai-to-analyze-the-sentiment-of-public-comments-on-ai-and-copyright/id=188585.

[572] *See* Reece Rogers, *The AI Backlash Keeps Growing Stronger*, WIRED (June 28, 2025, 6:30 AM), https://www.wired.com/story/generative-ai-backlash; *How the U.S. Public and AI Experts View Artificial Intelligence*, PEW RESEARCH CENTER (Apr. 3, 2025) https://www.pewresearch.org/internet/2025/04/03/how-the-us-public-and-ai-experts-view-artificial-intelligence.

and the nation second."[573] Such strategies resolve around sociological legitimacy but also contribute to competitive advantage among federal agencies and branches and other institutionalist considerations.

Thirdly, the Office's human author-centrism may be read as providing a fig leaf for traditional publishers' benefits, as is the case with the romantic ideology at large. More specifically, the humanist language may even be seen as providing a façade for the Office's supposed "regulatory capture" by dominant content industries, which scholars have sometimes asserted,[574] speaking of the Office's lesser regard for "consumers, technology providers, or the public interest more generally."[575] Such institutional maneuvers surface the longstanding constitutional questions about the Office's authority, the limits of its expertise, expanding role and place amongst the three branches of government.[576]

In this way, perhaps the recent humanization of institutional language responds to the crisis in perceived legitimacy of both copyright and the Office, and the changes in the demands of traditional publishing industries. Before the *copyright is for humans* turn, former register Maria Pallante had underlined the "importance of authors" for the "civilized society" where "creative expression is valuable," but she equally championed the role of the "downstream investment and innovation…[of] publishers and technologists," leading to sectors of economy "contributing billions in revenue."[577] As already mentioned, Pallante was not sold on the anthropocentric character of the law.[578] She also advocated for the USCO's institutional expansion, which ultimately led to her firing.[579]

Not only is humanist language easier to swallow but it also subtly reinforces the importance of copyright in the post-human era and of the Office in the institutional framework. After all, if the law is to protect human creativity in the AI era, then registration and examination should become both fundamental and more extensive.[580] Surely enough this is what the Office's economists' report found: if the human authorship requirement is to be intelligible, then it may ask for "contemporaneous

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[573] Aaron K. Perzanowski, *The Limits of Copyright Office Expertise*, 33 Berkeley Tech. L.J. 733, 743-44 (2018) (quoting Pallante).

[574] *See* JESSICA LITMAN, DIGITAL COPYRIGHT 74 (2001) (USCO has "tended to view copyright owners as its real constituency, and has spent the past ten years moving firmly into the content industry's pocket"); *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 53-54 (1994) (same); *see also* Liu, *supra* note 490, at 158; Aaron K. Perzanowski, The Limits of Copyright Office Expertise, 33 BERKELEY TECH. L.J. 733, 743-44 (2018).

[575] Dave Fagundes & Saurabh Vishnubhakat, *Copyright's Administrative Law*, 70 J. COPYRIGHT SOC'Y U.S.A. 417, 478-79 (2023).

[576] Perzanowski, *supra* note 563, at 735-44.

[577] Pallante, *supra* note 48, at 124.

[578] *Id.* at 143.

[579] Perzanowski, *supra* note 563, at 743-44.

[580] *See* Zvi S. Rosen, *Examining Copyright*, 69 J. COPYRIGHT SOC'Y U.S.A. 481 (2023).

documentation of the creative process." Meanwhile, the Office has started to share internationally the advantages that the registration system may offer in the AI-era.[581] Whether this proves successful remains to be seen: if copyright does not protect the most valuable subject matter because it is AI-generated, then it risks becoming irrelevant.

Nonetheless, one should not lean into an overly cynical reading of the humanist turn, whose future is uncertain following Shira Perlmutter's termination, steeped in controversies over the procedure and authority of the president.[582] Seemingly, it followed the Office's another publication – a report on AI model training, which appeared not sufficiently sympathetic to the technological lobby.[583] It is debatable whether the Office's stance on the protectability of AI-generated works serves anyone, including traditional publishers. Some even claim that the USCO is not stakeholder-friendly enough and "hurts" the movie and music industries;[584] though this depends on how broadly one reads the human authorship requirement, as explained in Part II.

IV. NOMINAL HUMANISM AND COPYRIGHT'S MORAL LEGITIMACY

Paradoxically, it seems that ideological commitments of copyright – which determine its legal and constitutional legitimacy, fit, justification, and the content of the next chapter in the chain-novel[585] – have long prevented a human creator-oriented reform. If so, doctrinal scholars' delegation of addressing human creators' struggles through another area of law are similarly unrealistic.[586] Indeed, the study of a disjoint between the law's rhetoric, doctrine, and distributive effects has occupied much of the U.S. legal scholarship.[587] Even in Europe, where copyright presents itself as *droit d'auteur* and there is no work for hire, the results are near-identical.[588] In fact, many have accepted it as inevitable that even if authors were the initial owners, network effects undercut equal distribution, and they would likely transfer their rights to intermediaries or engage in licensing deals, which clearly favor the latter given unequal

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[581] Copyright Law and AI: Time to Revisit Copyright Registration?, Univ. Coll. London Faculty of Laws (May 14, 2025), https://www.ucl.ac.uk/laws/events/2025/may/copyright-law-and-ai-time-revisit-copyright-registration.
[582] *See supra* note 27.
[583] *See id.*
[584] Lee, *supra* note 377, at 1571-73.
[585] *See generally* DWORKIN, *supra* note 183.
[586] *Cf. supra* note 469.
[587] *See generally* Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROBS. 71 (2014) (overviewing the debates).
[588] *See* Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 579 (2006) (analyzing how French law leads to "similar" results).

bargaining power.[589] Many have thought the failure of copyright reforms in the area makes the situation hopeless.[590] Likely, the situation will only get worse in an AI-driven economy, where creators can, to a greater or lesser extent, be replaced by machines, often owned by corporate entities.

If this is an inevitable outcome and given that the institutions cannot propose radical reforms due to political constraints (and self-interest), the motivation behind the USCO's authorial rhetoric lies primarily in sociological, and to a lesser degree in legal-constitutional legitimacy seeking.[591] This leads to the question of moral legitimacy of the human authorship requirement and of copyright itself.

A. Legitimacy of the Humanist Rhetoric

Humanist copyright employs a rhetoric dedicated to constituting culture, community, and meaning.[592] If so, then perhaps preserving the anthropocentric aesthetic is of benefit not just to the status quo, but also individuals' and society's self-conception.[593] This is the law's "social magic."[594] Indeed, even copyright's critics admit that "few would support a legal regime that gave no weight whatsoever to individual authorship," since we "value the contributions that creative people make."[595] In this way, human-centered legal rhetoric may respond to social anxieties regarding human nature and value in the AI era, at least at the expressive level.[596]

While the legal form and the rights it conveys lead to a kind of interpersonal recognition, because today's creators typically are not owners (and even if they are licensing deals extract any and all value), and are earning less and less, the recognition is rather limited.[597] Going beyond the USCO and looking critically at copyright discourse,[598] it

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[589] *See* Litman, *supra* note 31, at 544.

[590] *Id.*; *cf.* 556-58 (examining non-copyright based artist-oriented proposals); Landy, *supra* note 507.

[591] *Cf.* Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353, 378 (2020) ("[I]t can be legally legitimate for the Justices to consider the Court's sociological legitimacy in their decision making and perhaps even to decide cases based on sociological legitimacy concerns").

[592] White, *supra* note 52, at 688, 692.

[593] *See* Blaszczyk, *supra* note 464; Fromer, *supra* note 25, at 1767 ("[P]eople experience these possessory and self-concept effects with regard to their artistic creations"); Chander & Sunder, *supra* note 544.

[594] Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 959 (1995) (drawing on Bourdieu's philosophy).

[595] Cohen, *supra* note 494, at 160–61.

[596] *See* Gervais, *Machine*, *supra* note 33, at 38 ("If we refuse to take the position that the focus of IP law is human creativity…what will be left for us to do?").

[597] *See* Litman, *supra* note 31, at 542.

[598] For an example of critical discourse analysis in copyright scholarship context, see Marius Buning, *Teaching Intellectual Property: Constructing the Historical Narrative of Intellectual Property in University Textbooks*, *in* OWNERSHIP OF KNOWLEDGE:

seems that humanist scholars risk being read as defending the status quo not just in the broad sense – a commitment to human creativity or even copyright as a normative project forming part of the political-legal order – but also the copyright doctrine and distribution as they currently exist.[599] For example, Ginsburg's humanist account describes copyright as the "law of authors' rights,"[600] invokes Renaissance philosophers,[601] claims that the "essence of copyright is human individuality,"[602] that the 1976 Act "reoriented copyright" towards authorship, makes "creativity the lynchpin of coverage," and even embodies a "natural rights principle of 'you create [and fix] it; it's yours.'"[603] While this is an account which is partly correct, its rhetoric glosses over the depressing situation in which most authors find themselves,[604] the regulatory turn copyright has made,[605] and downplays the transformation that copyright's framework had taken over the last century, presenting the work for hire as a mere exception.[606] In other words, while Ginsburg is right that "authorless" works are not protectable, the rhetoric in which she clothes this argument suggests more than the fact that a machine cannot be an author.

Of course, this is neither to suggest humanists are unaware of the economic reality nor that they are ill intentioned. Ginsburg herself has described the dominant paradigm in American copyright thinking as one of "money talks," an "investment view" of copyright, which "also means that money writes, composes, paints and sculpts."[607] Perhaps, the blending of descriptive and normative claims is an attempt to move the law closer to the humanist utopia, or at least mitigate the risks popular discontent poses.

In this respect, by stripping away the myths concealing copyright law, one may thus uncover truths about the law, politics, and society at large. This may be seen as a liberation from rhetoric, which leads to better, or at least more democratic outcomes.[608] In this regard, scholars have noted that the law uses humanist concepts to justify results which could otherwise be sociologically, and perhaps morally, lacking in legitimacy. For example, "human dignity" is invoked in contexts such as gun rights

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BEYOND INTELLECTUAL PROPERTY 91 (Dagmar Schäfer et al. eds, 2023) (analyzing the rhetoric of English IP textbooks).

[599] *Cf.* Ginsburg, *supra* note 31, at 93-4; *see also* Mark D. Walters, *Legal Humanism and Law-as-Integrity*, 67 CAM. L. J. 352 (2008) (rooting Dworkin's legal theory in "common law humanism").

[600] Ginsburg, *supra* note 31, at 124.

[601] *Id.* at 93-4.

[602] *Id.* at 166.

[603] *Id.* at 114-15; *see* Ginsburg, *supra* note 427, at 636 ("[A]uthors…underpin the 1976 Act to a greater extent than its predecessors").

[604] *See* Litman, *supra* note 31, at 540.

[605] *See* Liu, *supra* note 18.

[606] *Cf.* Bracha, *supra* note 36, at 264-5.

[607] Jane C. Ginsburg, *Moral Rights in a Common Law System*, 1 ENT. L.R. 121, 122 (1990).

[608] *See* Margaret Jane Radin, *Rhetorical Capture*, 54 Ariz. L. Rev. 457, 468 (2012).

and campaign finance, trumping competing values, and precluding open political choice.[609]

Nonetheless, doing away with legal humanism may also lead to "disenchantment," "anomie," or the "night of the world," as modern philosophers have written. After all, neither copyright, nor the law at large, depend ultimately on public acceptance but obedience.[610] Pointing out the flaws in humanist regimes may lead to even worse ones – ones which are committedly anti-humanist systems both in practice and rhetoric – at least before a better tomorrow comes, if it ever does.[611] Therefore, scholars often argue that the first step to a morally illegitimate regime is anti-humanist expression; though often noting that illegitimate regimes use different kinds of humanist rhetoric as well.[612] It is thus unclear if the society would be better off without humanist rhetoric, or if the undermining of copyright's stability or abolition would be net positive.

Importantly, it seems that nominal humanism and minimalist copyrightability doctrines lead to an extension of the author status to all participants in the society, which is fundamental to modern democracy.[613] After all, in the cognitivist paradigm, it is the ability to use language and reason, to create, which differentiates people from animals or tools – and those towards the top of the society's ladder from those at the bottom.[614] Scholars show that copyright, modernity, and liberal individualism are historically and conceptually intertwined,[615] and some even claim that the "author of copyright law *is* the radically individualized, atomistic subject

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[609] *See* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 192 (2011).

[610] *See* Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1198, 1206 (2008).

[611] *See* ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 276 (Quintin Hoare & Geoffrey Nowell-Smith ed. and trans. 1971) ("The crisis consists…in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear.").

[612] *See* ALAIN SUPIOT, HOMO JURIDICUS: ON THE ANTHROPOLOGICAL FUNCTION OF THE LAW vii-viii (2017); JÜRGEN HABERMAS, THE FUTURE OF HUMAN NATURE 11 (2003); HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 447 (1967).

[613] *See* Beebe, *supra* note 86; Netanel, *supra* note 347, at 288.

[614] *See* Brian Leiter, *The Boundaries of the Moral (and Legal) Community*, 65 ALA. L. REV. 1163 (2013); *see also* Commissioner Hersey, Dissent, *in* Final Report of the National Commission on New Technology Uses of Copyrighted Works, https://digital-law-online.info/CONTU/contu14.html ("A society that accepts in any degree…equivalences of human beings and machines must become impoverished in the long run…").

[615] *See* MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES 387 (1973) ("[M]an is an invention of recent date. And one perhaps nearing its end"); *What is an Author?*, *in* 2 AESTHETICS, METHOD, AND EPISTEMOLOGY 205, 205 (James D. Faubion ed., Robert Hurley et al. trans., 1998) ("The coming into being of the notion of 'author' constitutes the privileged moment of individualization in the history of ideas…").

of possessive individualism."[616] In this sense, copyright's humanism institutionalizes the Enlightenment belief in the rational autonomous subject as the bearer of rights endowed with dignity.[617] If the humanist rhetoric is as fundamental to liberal democracy as it seems, then the question of its moral justification becomes even more entangled.

In copyright, the ideology of human authorship may serve important functions: not just conceal the power structures, making them bearable, and providing a source of identity to humans as the creative species – but also practically, the postulate of excluding "authorless" works, however conceptually tricky, and talk of human progress, however ephemeral, provide some curb on the power of corporations to the benefit of authors.[618]

This is a dilemma which transcends the narrow questions of copyright law and goes to the fundamental questions of political philosophy. Can we justify the legal system without its myths or fig leaves?[619] If they are untrue, should we get rid of them, even if the structure falls? And should we preserve the legal framework which does not fulfill its humanist promises, and perhaps even the constitutional purpose, satisfactorily?

These questions must be left for another day. However, the problem is not only that the human authorship requirement will not protect human authors in the AI era or that it does not protect creators from corporations. Just as the essence of humanism lies in essentializing and universalizing the human being, that is drawing a fixed boundary on what it is to be human, in copyright law, humanism reinforces a fixed boundary on what it means to be an author.[620] Such exclusion from community of authors had historically applied to women and the enslaved, a problem which the *Thaler* court dismisses without interrogation,[621] and continues to exclude those whose "communicative activities do not fit within the individualized and originative account of authorship."[622] As already mentioned, traditional knowledge and cultural expression, folklore, and

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[616] Craig & Kerr, *supra* note 301, at 50.

[617] *See e.g.*, RICHARD ETLIN, IN DEFENSE OF HUMANISM 37 (1996) ("[T]he divine spark which gives and sanctifies creativity and genius in the domain of art is comparable to the natural law that gives and sanctifies the rights of man").

[618] *See* Bracha, *supra* note 36, at 268-70 ("The rhetoric and rules of a society… may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions") (quoting E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 265 (1975)).

[619] *See* Christoph Kletzer, *Kelsen and Blumenberg: The Legitimacy of the Modern Age*, 25 KING'S L. J. 19, 19 (2014).

[620] *See* Costas Douzinas, *Human Rights, Humanism and Desire*, 6 ANGELAKI: JOURNAL OF THE THEORETICAL HUMANITIES 183, 189 (2001).

[621] The court did not address the latter question, even though it was raised at oral argument. *See* Zvi S. Rosen, *Were Works by Slaves Eligible for Copyright? A Case Study of Frederick Douglass*, MOSTLY IP HISTORY (Dec. 30, 2024), https://mostlyiphistory.com/2024/12/30/were-works-by-slaves-eligible-for-copyright-a-case-study-of-frederick-douglass.

[622] Craig, *supra* note 184, at 236.

other forms of art associated with minorities are negatively affected by the doctrine.[623] If the requirement of human authorship is interpreted broadly, it may exclude AI-aided production of commercial value; if it is interpreted narrowly, it will exclude only works, such as that of Thaler or Kashtanova, in the same way it has excluded the postmodern art of *Kelley*.

B. Reformist, Not Nominal Humanism

For copyright humanism to fulfill its promises and not become a legitimization of the status quo, it must present a normative project of the law which promotes human flourishing beyond nominal anthropocentrism.[624] While the humanist cause may appear similar to "copyright minimalism" – the USCO even notes that the "availability of vastly more works" generated by AI would be antithetical to copyright's purpose – it may end up doing the opposite: providing a humanist fig leaf for the "AI-assisted" and corporate-authored or corporate-owned copyrights.[625] Indeed, it is likely that the human authorship requirement would remain in place even if Congress amended the Act or if the Supreme Court found that prompted works are protectable. After all, no one wants to be against human authors. All stakeholders disagree on is the breadth of this commitment, which leads to its nominal, rather than substantive nature.

This does not seem satisfactory. Copyright humanism cannot rest on an apparent formalist exclusion of any AI-aided production, not only because it is likely practically ineffective, but also because it does not seem coherent, just, or maintaining the relevance of the institution in the 21st century. It also does not address the main thorn: copyright has not promoted creativity nor cared for human authors for the longest time. Instead of becoming an empty façade, the humanist ideology may supply the building blocks necessary to transform the law from within.[626]

Copyright discourse should interrogate the conception of progress it seeks to promote, rather than rest on the platitude that it must be "human."[627] On a doctrinal level, this may lead to rethinking of the standard of originality, which could be higher, evidence based, and rooted more strongly in the power of the human mind.[628] Having more works is not necessarily better, not just in relation to AI-assisted production, but all subject matter.[629] Further, one must interrogate in what sense copyright

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[623] *See* Riley, *supra* note 13; Emily B. Cárdenas, *Progressive Copyright Theory*, 84 MD. L. REV. 812 858-63 (2024) (discussing the scholarship of Farley, Greene, and others).
[624] *See* Lorenzo Zucca, *Seeing Law Feelingly - Humanistic Jurisprudence, Poetic Wisdom, and the Future of Law* (May 05, 2025), https://ssrn.com/abstract=5242109.
[625] USCO, COPYRIGHTABILITY, *supra* note 39, at 36.
[626] *See* Bracha, *supra* note 36, at 271.
[627] *E.g.*, JESSICA SILBEY, AGAINST PROGRESS (2022).
[628] *See* Miller, *supra* note 158, at 457; *see also cf.* USCO, COPYRIGHTABILITY, *supra* note 39, at 36.
[629] *See* Miller, *supra* note 158, at 457.

has incentivized creativity, and if at all, whether the law can continue to do so in the era of costless algorithmic creativity, if other tools are not better, and whether copyright's non-economic features, including professional artists status conferrals, are tenable in the AI era. Further work is required to avoid falling into the trap of nominal humanism: advocating yet another rhetorical spin which ends up in a cliché. Perhaps, instead of doubling down on the language of creativity in copyrightability, the law should shift to another conception altogether.[630]

In the same vein, copyright should reevaluate its exclusionary practices at the levels of copyrightability, its concepts of originality, work, authorship, and fixation, and registration. In the AI era, when the "death of the author" becomes more apparent, the law must interrogate its treatment of collective creativity and the privileged role copyright gives individuals, including legal persons.[631] Further yet, it copyright discourse must reconsider the role of corporate authors and proprietors of copyright works, the question of human authors economic livelihood and bargaining power, while scholars may need to start entertaining the long overdue question if the justification for a system of monopolies in ideas limiting free exchange of knowledge is weaker than ever.[632]

Crucially, copyright humanism should reconsider its own rhetoric: starting with describing the law as one of authors' rights, the pretense that the human authorship requirement will protect human authors in the AI era (whether much of AI-assisted content is found protectable or if it is uncopyrightable and thus cheaper). Similarly, it may need to stop entertaining the illusion that the technology can be stopped or that the means of cultural production which employ artificial intelligence are necessarily qualitatively different, and reconsider if they should be deprivileged.

Perhaps, the initiative that the USCO and humanists took up is a step in the right direction. A moment of crisis offers the potential of new beginnings – if there is enough will.[633] It is only human agency which may bring a human-centered culture and legal regime, not formalist rejections of prompt-based creative production.

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[630] *Compare* Viktoria Kraetzig & Jannis Lennartz, *Copyright as Democracy of Aspiration: Rethinking EU Law's Approach to a Protected "Work"*, 60 COMMON MARK. L. REV. 1655 (2023) *and* Haochen Sun, *AI Output Transparency: Promoting Justice of Differentiated Creativity Through Copyright Law* (unpublished manuscript) *with* Madison, *supra* note 124.

[631] *See* David J. Gunkel, *AI Signals the Death of the Author*, NOEMA (June 4, 2025), https://www.noemamag.com/ai-signals-the-death-of-the-author.

[632] *See* Eben Moglen, *Freeing the Mind: Free Software and the Death of Proprietary Culture*, 56 ME. L. REV. 1 (2004); *see also* Breyer, *supra* note 19; Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313 (2018); Martin Skladany, *Alienation by Copyright: Abolishing Copyright to Spur Individual Creativity, 55* J. COPYRIGHT SOC'Y U.S.A. 361 (2008).

[633] *See* Bracha, *supra* note 36, at 271.

CONCLUSION

Copyright institutions have asserted the requirement of human authorship as a prerequisite for copyrightability, proclaiming the centrality of human authors in copyright. It is not clear what the requirement entails, if it addresses the difficult questions of copyright in AI-assisted production, if its breadth can legitimately extend far beyond exclusion of the "machine authors," and even if it is practically enforceable. Instead, it seems like a symbolic exercise, meant to respond to the legitimacy crisis in which copyright finds itself in the AI era – and had been in long before the advent of the technology.

This Article analyzed the question of copyrightability of AI-assisted works doctrinally, deconstructed the USCO Guidance, the dicta in *Thaler* and the pending appeal in *Allen*. The Article then turned to critical discourse analysis, taking apart the rhetoric of copyright institutions and contrasting it with the law's minimal substantive requirements and the economic distributions which always have favored corporations and intermediaries, and continue to do so more and more. The Article analyzed the humanist rhetoric as an institutional strategy and assessed its effects on legal, moral, and social legitimacy of the law.

Finally, the Article argued that copyright humanism, not to become a façade, must be willing to creatively and radically reevaluate and reimagine copyright law, confront the issue of corporate authorship and ownership of culture, of aesthetic discrimination past and present, and interrogate whether humanist values and normative theories continue to support the institution of copyright at all. Seeing beyond humanist rhetoric allows us to ask difficult questions of justification for monopolies in ideas and their effects – which have haunted academia and public debates since copyright's inception and only intensified in the digital era.