

POSTHUMAN COPYRIGHT: COPYRIGHT, AI, AND LEGITIMACY

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Posthuman Copyright

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- The requirement of human authorship is an institutional attempt at asserting legal, moral, and sociological legitimacy at a time of crisis.
 - It's necessary for legal coherence and moral legitimacy of the law, and attempts to win over the people both to copyright and its institutions: the U.S. Copyright Office, and the courts.
 - At the same time, copyright doctrines of authorship and originality constitute low thresholds. Arguably, little, if anything, is non-human authored.
 - While the USCO interpretation of the standard appears more expansive, it is narrower than commonly thought.
 - Human author-centric rhetoric provides a distraction from culture becoming machine-made, and from copyright benefiting mostly corporations, rather than individual authors.
 - Copyright humanism is yet another incarnation of copyright's "ideology of romantic authorship" or "creativity rhetoric," meant to legitimise the law, more than provide practical solutions.

(C) Legitimacy Crisis

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- Copyright is in moral and sociological crises because it does not promote human creativity or help artists, but rather is a tool of capital first and foremost
 - Therefore, AI copyright humanism and the USCO position, must be read critically.
 - Are they attempts at reform or instrumental, institutional use of rhetoric?

(C) Legitimacy Crisis		
Legal Legitimacy	Moral Legitimacy	Sociological Legitimacy
Constitutional tensions behind work-for-hire doctrine	Inequality of distributions	For Walt Disney only?
Clash between original authorship and aesthetic/tech neutrality—AI	Non-humans: publishers, intermediaries, copyright aggregators	Cynicism & ignorance proliferating for decades
Restatement adopted with dissents	Semiotic democracy & AI	Tech billionaire proposals to get rid of copyright altogether
Assault on USCO and the courts	Contested notions of progress	
Is copyright needed in the era of cheap creativity at all?		

AI Brings Out Old Tensions

- “Most copyrights of commercial value now belong not to artists, but to **corporations**... litigation arises...between giant corporations seeking to sequester a **source of rent**. The language of these legal battles has remained much the same...” (Bellos & Montagu).
- “Framers...could hardly have imagined that the establishment of copyright...was one of the most **instantly and thoroughly democratic statements** they had made” (Newhoff).
- Copyright’s minimalist...originality requirement is but a mockery of the romantic vision of the author as an individual spirit who creates ex nihilo...Yet American copyright discourse adamantly resists a “sweat of the brow” regime and clings to originality as a constitutive feature of the field (Bracha)

USCO's Response to AI:

- “Human creativity still matters, legally”
- “Society would be poorer if the **sparks of human creativity** become fewer or dimmer,”
- AI undermines authors ability to “**make a living from their craft**” & makes it “harder to find **inspiring** or **enlightening content**”
- “Undermine[s] the goals of the copyright system” both economically and conceptually, since “the incentives authorized by the Copyright Clause are...provided to **human authors** as the means to promote progress”
- 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”
- Humanist scholars like Ginsburg add:
 - (C) is the “law of authors’ rights,” embodies the “natural rights principle of ‘you create [and fix] it; it’s yours,” 1976 Act “reoriented copyright” towards authorship, the “essence of copyright is human individuality “

Copyright Basics

- Copyright Requires:
 - ***Works***, which are
 - ***Authorial***
 - ***Expressions***, rather than ideas, and are
 - ***Original***, that is
 - ***Creative and Not Copied*** from another, and
 - *Fixed in a tangible medium*
- *Copyright subsists automatically upon creation, but can also be registered with the Copyright Office*
- *Authorship never defined in the statute*
- *Originality never defined in the statute*
- *Authorship and originality interact, with the law prioritising the person who has creative control over the output*



Minimal Requirements for Copyright

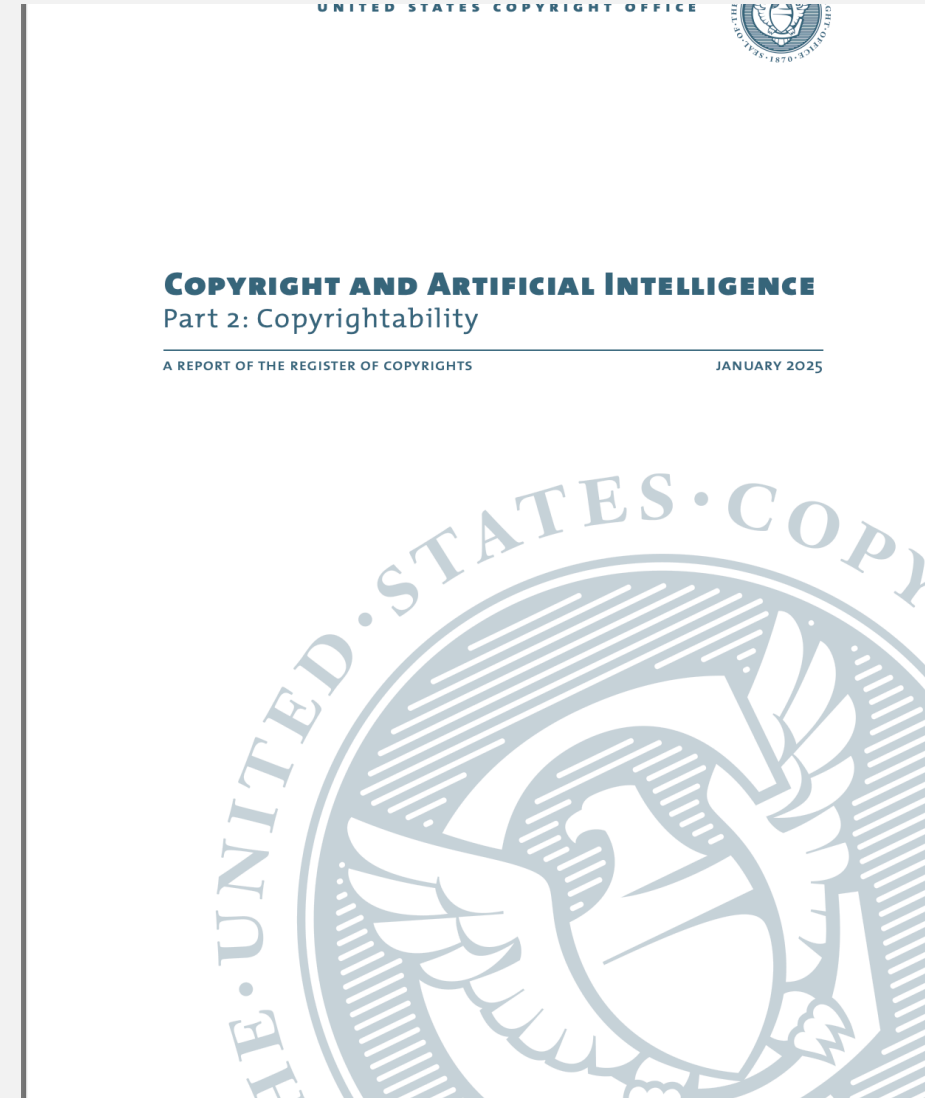
- If there is no author who expresses, there is no expression, there is no work, which in turn can be neither creative nor original.
- At the same time, the standards are so low, as to present next to no obstacle.
- Authorship Mostly Symbolic
- Originality:
 - Independent Creation + Modicum of Creativity
 - Personal Reaction Upon Nature
 - “Paper Tiger,” “Myth,” “Purely Symbolic”
- Work for hire
 - 17 U.S.C. §§ 101, 201(b)

USCO's Response: Requirement of Human Authorship

- “Copyright can protect only material that is the product of human creativity”
- Office will “register an original work of authorship, provided that the work was created by a human being” and refuse if non-human authored
- If a work’s traditional elements of authorship were produced by a machine, the work lacks human authorship and the Office will not register it.
- Human authors are entitled to copyright **in their works of authorship** that are perceptible in AI-generated outputs, as well as the **creative selection, coordination, or arrangement of material in the outputs**, or **creative modifications** of the outputs.

The USCO Report

- The use of AI tools to **assist rather than stand in for human creativity does not affect the availability of copyright protection** for the output.
- Copyright protects the original expression in a work created by a human author, **even if the work also includes AI-generated material.**
- Copyright **does not extend to purely AI-generated material**, or material where there is **insufficient human control** over the expressive elements.
- Whether human contributions to AI-generated outputs are sufficient to constitute authorship must be analyzed on a case-by-case basis.
- Based on the functioning of current generally available technology, **prompts do not alone provide sufficient control.**



Shift to Authorship



Ceci n'est pas une pipe.

M. C. Escher

Thaler v. Perlmutter

- DABUS is not human ergo not an author.
 - “[A]uthorship is an **entirely human endeavor**. Authors of copyrightable works must be human...” (Kelley v. Chi. Park Dist.)
 - “it is not creations of divine beings that the copyright laws were intended to protect” (Urantia Found. v. Maaherra)
 - “A living garden **lacks the kind of authorship** and stable fixation normally required to support copyright.”
- “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.**”
- “Authors are at the center of the Copyright Act.”
- The statute “requires all eligible work to be authored in the first instance by a human being “
- **The requirement of human authorship “does not impede the protection of works made *by* or *with* artificial intelligence”**
- It does not conflict with work for hire, *somehow*



Allen v. Perlmutter

- *Théâtre D'opéra Spatial*
- Is prompting enough?
- 600+ choices
- Iterative Process
- Authorial Originality
- Aesthetic Neutrality?



Just like urinals, empty bottles, and picked up wood?
Not for the Colorado Art Fair!

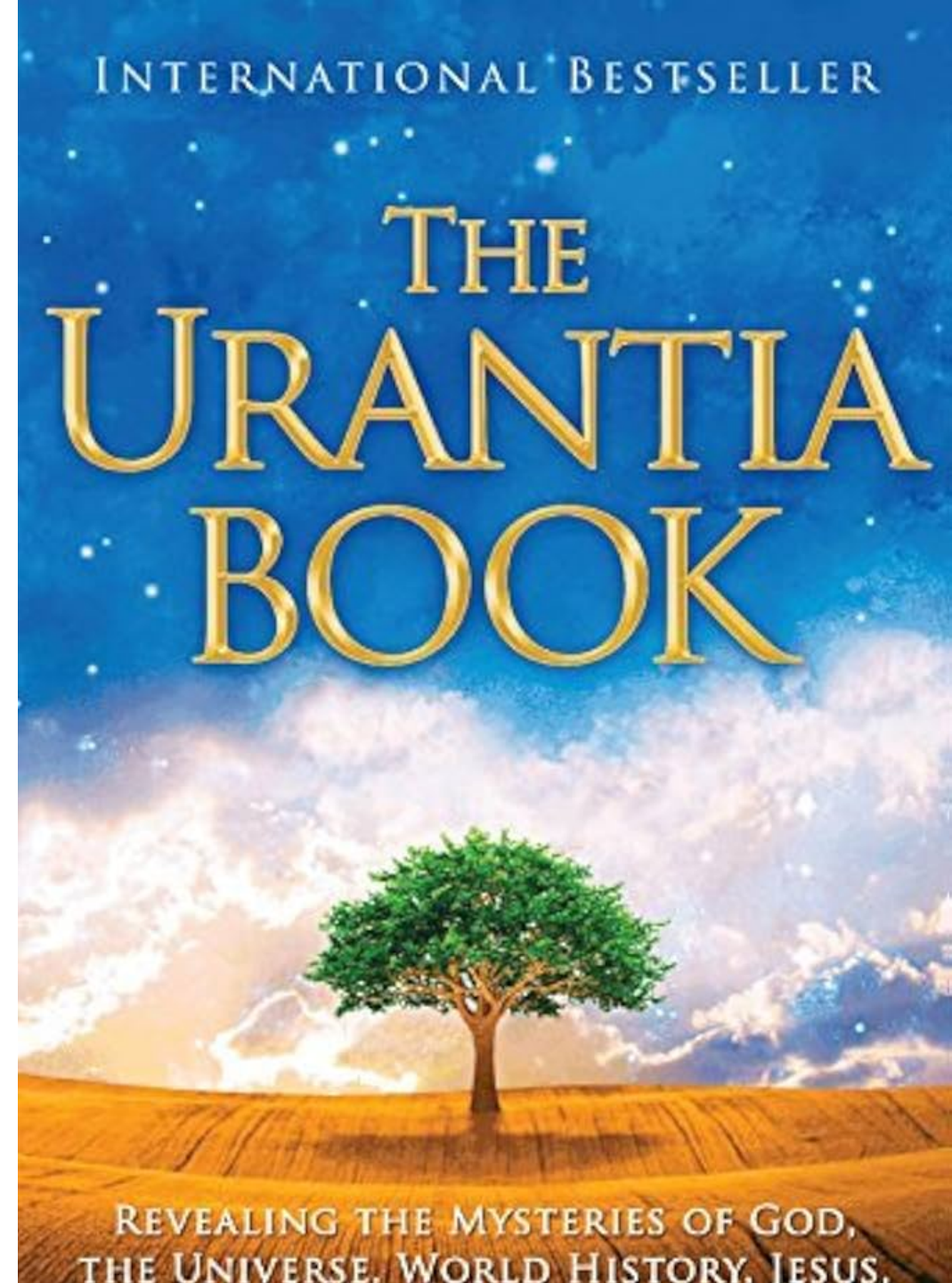


Floodgates Already Open

- Around 2,000 AI-assisted works registered following USCO Guidance since 2023
- USCO's own economists think the human authorship requirement is unworkable
- Disclosures are minimal – no-one can figure out what is excluded, while presumption of validity applies
- Several Grounds of Protectability
 1. Disclaiming AI-generated elements and registering only human-authored elements
 2. Sufficient modification of AI-generated elements
 3. Original Compilation
 4. Or... courts find the USCO gets Allen & prompt-based works wrong

A book “authored by non-human spiritual beings” can *still* qualify for copyright protection if there is “human selection and arrangement of the revelations.”

Those who were responsible for the creation of the tangible literary form that could be read by others, could have claimed copyright for themselves as "authors," because they were responsible for the revelations appearing “in such a way as to render the work as a whole original.”



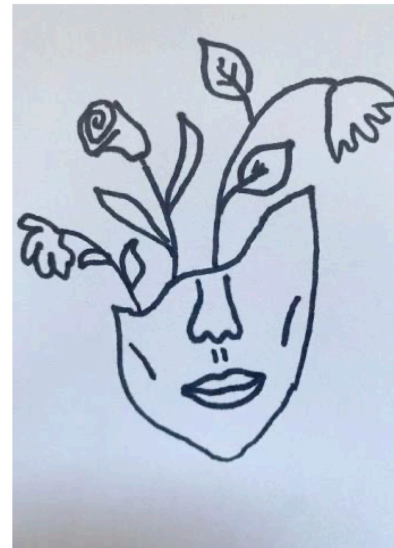
Rose Enigma – Disclaiming

The AI system produced this output:

Prompt

*"a young cyborg woman
(((roses))) flowers coming
out of her head,
photorealism, cinematic
lighting, hyper realism, 8k,
hyper detailed."*

Input



Output



Exclusions of source code generated by AI in software registrations

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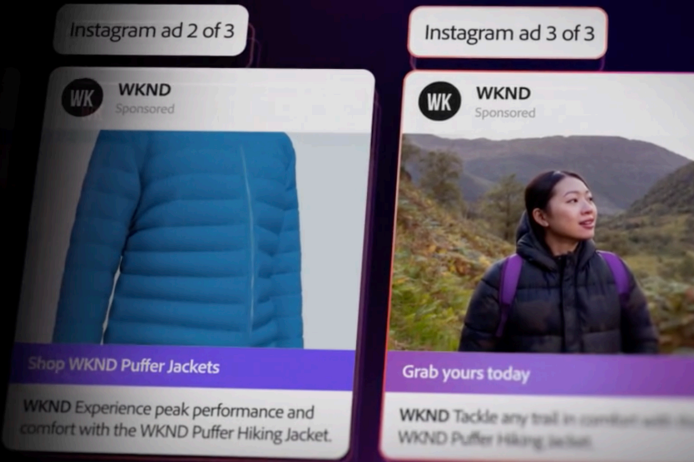
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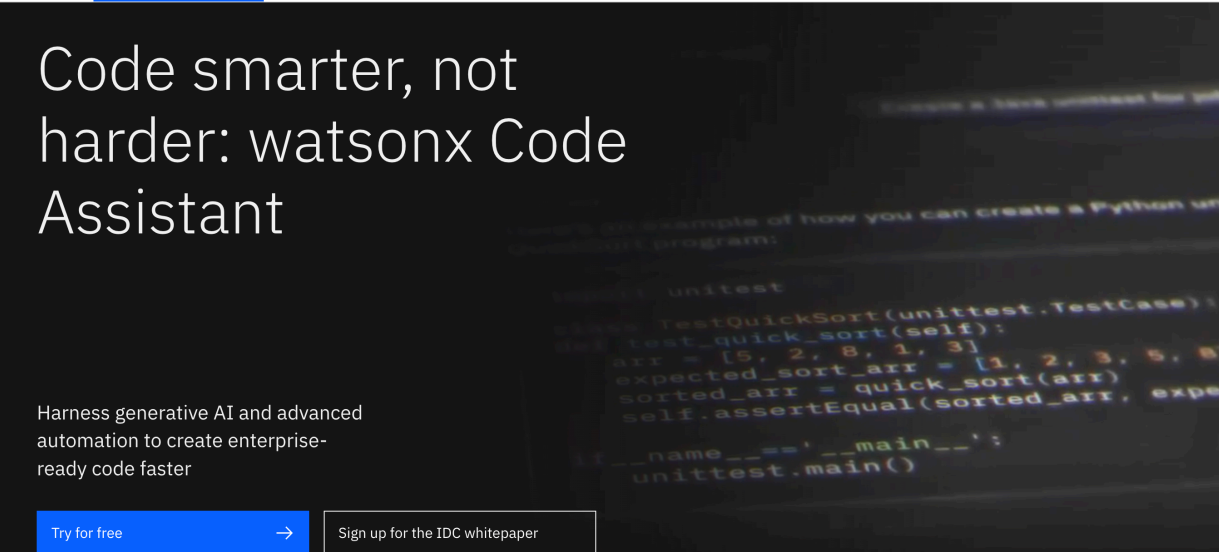
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```
from typing import List
import unittest

class TestQuickSort(unittest.TestCase):
    def test_quick_sort(self):
        arr = [5, 2, 8, 1, 3]
        expected_sort_arr = [1, 2, 3, 5, 8]
        sorted_arr = quick_sort(arr)
        self.assertEqual(sorted_arr, expected_sort_arr)

if __name__ == '__main__':
    unittest.main()
```

Compilations – Selecting, Coordinating, Arranging...

U.S. Copyright Office

Copyright and Artificial Intelligence, Part 2: Copyrightability

[T]he Office finds that the compilation of these images and text throughout the Work contains sufficient creativity under *Feist* to be protected by copyright. Specifically, the Office finds the Work is the product of creative choices with respect to the selection of the images that make up the Work and the placement and arrangement of the images and text on each of the Work's pages. Copyright therefore protects [the applicant's] authorship of the overall selection, coordination, and arrangement of the text and visual elements that make up the Work.¹³⁰

Multiple similar registrations have been made since then.¹³¹

A Single Piece of American Cheese

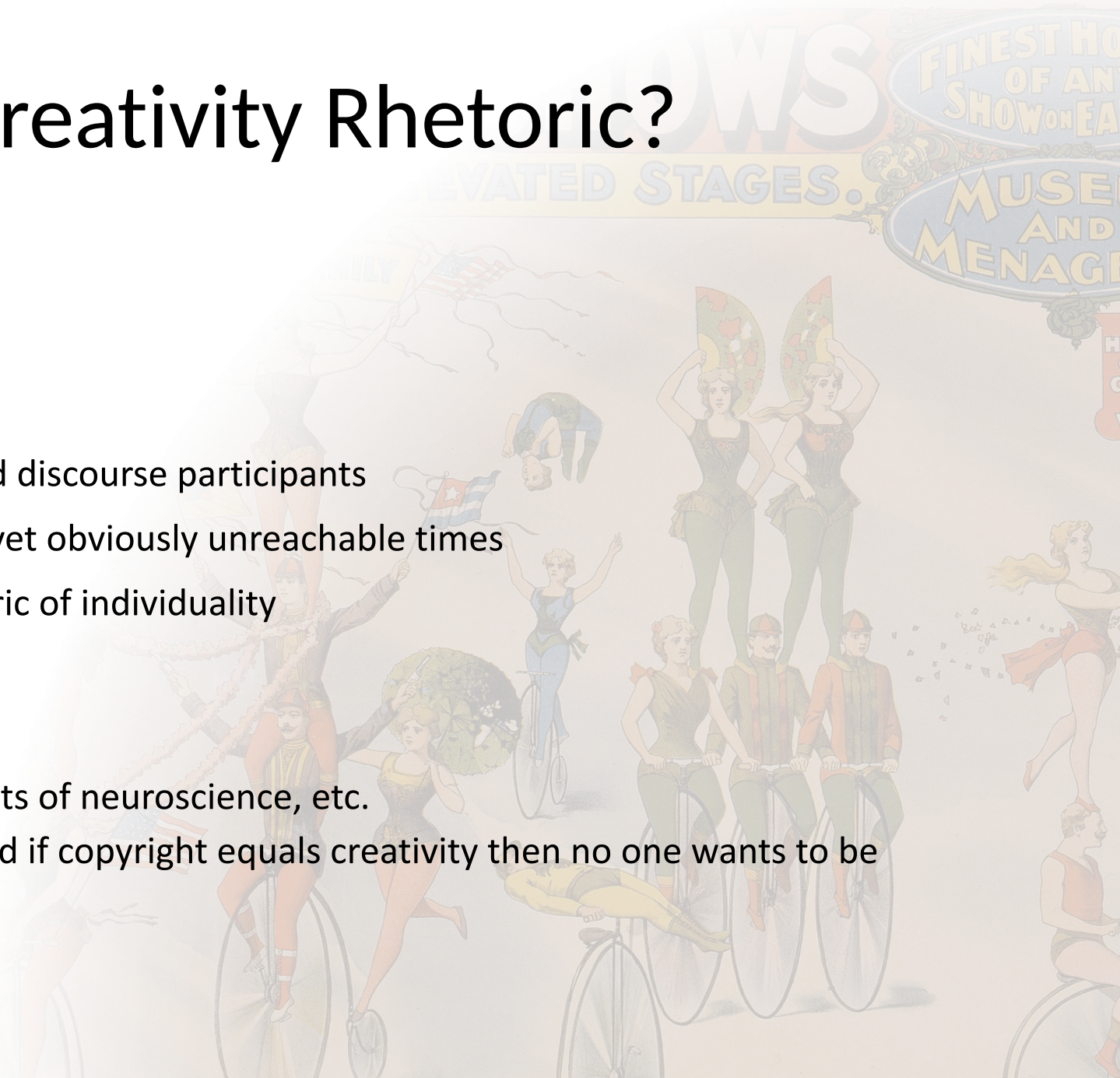
“Many popular AI platforms offer tools that encourage users to select, edit, and adapt AI generated content in an iterative fashion. Midjourney, for instance, offers what it calls ‘Vary Region and Remix Prompting,’ which allow users to select and regenerate regions of an image with a modified prompt....**Other generative AI systems also offer tools that similarly allow users to exert control over the selection, arrangement, and content of the final output.**

“Unlike prompts alone, these tools can enable the user to control the selection and placement of individual creative elements. Whether such modifications rise to the minimum standard of originality required under Feist will depend on a case-by-case determination. In those cases where they do, the output should be copyrightable.”



What Role for the Creativity Rhetoric?

- Enchants copyright and its building blocks
- Facially justifies the system
- A rhetorical tool of copyright advocates and discourse participants
- It provides a source of nostalgia for better yet obviously unreachable times
- Hides corporate interests behind the rhetoric of individuality
- Diverts from distributive concerns
- Submits romanticism to capitalist needs
- The law shies away from realism, the insights of neuroscience, etc.
- “[N]o one wants to be against creativity, and if copyright equals creativity then no one wants to be against copyright”



What Next? Reformist Copyright Humanism

- Reconsider:
 - The rhetoric
 - The role of corporations & distributions to authors
 - Aesthetic discrimination and collective creativity
 - Higher originality standard
 - The whole institution