

Art&Law in a nutshell

AI-Generated Art:
copyrightable or not?





“Théâtre d’Opéra Spatial” Jason M. Allen

AI art continues to cause debate

Few days ago, digital artist Jason Allen appealed the decision of the U.S. Copyright Office (“USCO”) denying copyright registration to the work ‘*Théâtre D'opéra Spatial*’, generated by Midjourney, an artificial intelligence program turning text into hyper-realistic images.

The work became famous for winning 2022 Colorado State Fair’s annual art competition, triggering fierce reactions from other participants, accusing Allen of cheating. Allen replied that he clearly informed Fair’s jury that his work was created using AI, by submitting the work under the name “Jason M Allen via Midjourney”.

Allen filed an application to register the copyright of the work with USCO in September 2022. The registration was refused by USCO on the grounds that one of the elements required for copyright protection, *i.e.* human authorship, was lacking, as Allen's insertion of prompts on Midjourney alone could not be considered sufficient for satisfying this criterion. The artist also demanded USCO to reconsider its initial refusal to register the work two times in 2023, arguing that human authorship requirement was misapplied. According to Allen’s view, the work generated by Midjourney merely constituted raw material that Allen transformed thanks to his creativity consisting in a series of prompts, adjustments and selections of the image. Nevertheless, USCO review board rejected Allen’s request refusing to register the copyright claim in the work.

Meanwhile, in March 2023 USCO published an official [statement of policy](#) declaring that AI generated works are not eligible for copyright protection lacking human authorship and then USCO will not grant registration to them.

Recently, Allen appealed USCO decision before the Federal Court in Colorado ([Allen v. Perlmutter](#)), claiming again that his work can be considered authored by a human. Indeed, the artist argues that human contribution in the work consisted in the choices he made providing creative input to the machine through his prompts, as already happens, for example, with photography or

other expressive media. Allen explains in his complaint that to create the work he wrote a text prompt basically directing AI to create an image with the specification based on his instructions and then he rephrased, modified the prompt to ensure AI incorporated his instructions into the final output. This creative process took place six hundred twenty-four times according to Allen.

Moreover, the artist argues that the criterion of human authorship will be increasingly difficult to apply for forthcoming AI artworks, as it will be more and more difficult for the examiner to discern whether a work is created by artificial intelligence alone or not. Finally, the artist claims that USCO denial causes confusion in the art marketplace as to ownership of copyrights on the work.

In the forthcoming months the ruling on this case, as well as the appellate decision on Thaler case concerning another AI generated work '*A Recent Entrance to Paradise*' (at first instance, the Court denied copyright protection to the work), will give us a clearer indication as to what direction US case law is taking on copyrights of generative artworks.

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