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Contemporary Approaches to IP Protection: Developments in the US Art Market

Introduction

Since the beginning of the COVID-19 pandemic in 2020, rapid technological changes have prompted challenges to the traditional interpretation of intellectual property (IP) rights, as regulators and lawmakers struggle to keep pace with ongoing developments. Multiple lawsuits have been filed involving new technologies, bringing these controversies to the fore. For instance, Google was involved in three separate cases involving fair use and copyright in the past decade alone.[1] The simultaneous expansion of the art market[2] has provided an opportunity to see how these challenges play out in real time, particularly with respect to non-fungible tokens (NFTs) and works created using artificial intelligence (AI).

In the United States (US), IP rights with respect to copyright and patents stem from the Constitution.[3] Trademarks are governed by state law and the federal Lanham Act.[4] It is important to note that the US takes a utilitarian approach to IP, seeking to balance innovation with protection for authors. Judicial precedent, established through case law, is another source of rights in this field. In particular, courts have been instrumental in analyzing the scope of fair use in copyright and establishing an element known as transformativeness, which is unique to the US legal system. They have also provided guidance on the likelihood of confusion and fair use in the trademark context. This article will examine recent art market-related developments involving IP rights to

[1] *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); *Google LLC v. Oracle America, Inc.*, 593 U.S. ____ (2021); *ML Genius Holdings LLC v. Google LLC*, Case No. 20-3113 (2d Cir. Mar. 10, 2022).

[2] Valued at $67.8 billion in 2022, with the US alone accounting for a 45% share of the global market ($30.2 billion). C. McAndrew, *The Art Market Report 2023*, Art Basel & UBS, p. 17, https://www.ubs.com/global/en/our-firm/art/collecting/art-market-survey.html [accessed: 2024.07.10].

[3] Art. I, Sec. 8, Clause 8 grants Congress the power 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."

[4] Pub. L. 79-489 (1946), codified at 15 U.S.C. § 1051 *et seq*.

chart the ongoing evolution of this field and what protections apply to works using new technologies, beginning with copyright and concluding with trademarks.

1. Recent developments in US copyright law

The federal Copyright Act[5] is the main law in this field and holds that copyright vests in the author of an original work fixed in a tangible medium of expression from the moment of its creation.[6] Registration is not a prerequisite for copyright protection generally, but it can serve as evidence of the when the work was created and the identity of the author to third parties. However, registration is required to file suit with respect to the underlying work (e.g. infringement claims). The US Copyright Office (USCO) is a government agency tasked with registering copyrights and applying the Copyright Act. While not a member of the judiciary, its decisions are given great weight by courts in IP matters. A certificate of registration from the USCO is considered *prima facie* evidence of the validity of the underlying copyright.[7]

1.1. Elements of fair use

The Copyright Act allows limitations on an author's exclusive rights if the use in question is considered fair use. This means that the copyrighted work is used "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research."[8] While considered a defense against copyright infringement, there is no uniform decision of what constitutes fair use. Determinations are made on a case-by-case basis, considering all the relevant facts and circumstances. The Copyright Act establishes the following factors to be used by courts when determining fair use: 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.[9]

Although other countries have similar exceptions to copyright infringement, typically related to non-profit or educational activities[10], federal courts apply the

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5 Pub. L. 94-553 (1976), codified at 17 U.S.C. § 101 *et seq*.

6 17 U.S.C. § 102(a) and 201(a).

7 17 U.S.C. § 410(c).

8 17 U.S.C. § 107.

9 *Ibid*.

10 For instance, there is no fair use doctrine in France but Art. L-122-5 of the Intellectual Property Code lists exceptions to an author's exclusive right to reproduce their work. These consist of private and gratuitous performances carried out within the family circle; parody, pastiche and caricature; and copies intended exclusively for private use. Works may be disseminated for purposes of press and news reporting or political, judicial, or academic gatherings meant to inform the public, but the author must always be credited.

concept of transformativeness to their fair use analysis of potentially infringing works. If a work demonstrates a new element or message that sufficiently distinguishes it from the original, it will be considered fair use: "New ideas, new expression, new information and new arts and creations further the [Constitutional] public policy that calls for new speech, new contributions to the dialogue, fresh thoughts, and new approaches to art and literature that are protected to ensure a free exchange of ideas. Copied, repeated, and republished artworks and expressions do not satisfy these goals of the originality doctrine in copyright."[11] The US Supreme Court (SCOTUS) originally adopted the transformative test in 1994, where it stated that a secondary work is considered transformative if it "adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message."[12] Since then, transformativeness has been at the core of fair use cases.

1.2. Transformativeness and art law

Transformativeness is often applied to appropriation art, which involves "the intentional borrowing, copying, and alteration of existing images and objects."[13] Contemporary appropriation artist Jeff Koons was accused of copyright infringement by photographer Art Rogers after Koons made a sculpture based on one of Rogers' photographs.[14] Koons argued that his work was fair use on the grounds of parody, but the court found that the two works were "substantially similar" and the copying was "blatantly apparent." In other words, "Koons used the identical expression of the idea that Rogers created" and did not add any new elements or commentary as criticism of the original, which is required for parody. Since the work was done "in bad faith, primarily for profit-making motives," it did not fall within the scope of fair use.[15] Notably, other works in the same series were also found to be infringing.[16]

Two decades later, artist Richard Prince managed to succeed in an infringement claim by demonstrating that his works presented a new aesthetic style, and a general observer would be able to distinguish between them and the originals. Unlike Koons, Prince modified the photographs by enlarging, blurring or sharpening them, adding elements and creating composites.[17] Following this ruling, courts implemented a flexible interpretation of fair use, essentially holding that stylistic changes were

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11 M. Murray, *Copyright Transformative Fair Use after Andy Warhol Foundation v. Goldsmith*, "Wake Forest Intellectual Property Law Journal" 2023, vol. 24, no. 2, pp. 4–5.

12 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) at 579.

13 https://www.moma.org/collection/terms/pop-art/appropriation [accessed: 2024.07.10].

14 *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

15 *Ibid.* at 307–310.

16 In 2021, the Paris Court of Appeals upheld a judgment against Koons for copyright infringement involving a sculpture based on an advertisement for clothing retailer Naf Naf. E. Kinsella, *A French Appeals Court Has Found Jeff Koons Guilty of Copyright Infringement Again – and Hiked Up His Fines*, Artnet News, 2021, https://news.artnet.com/art-world/appeals-court-upholds-jeff-koons-copyright-infringement-1946573 [accessed: 2024.07.10].

17 *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

sufficient to demonstrate transformativeness. However, a finding of fair use is heavily informed by the context in which the works were created; an artist that previously succeeded in meeting the transformativeness standard may later fail to do so. In May 2023, two lawsuits against Prince on the grounds of infringement were allowed to proceed to trial on the grounds that the artist did not provide sufficient evidence to support a fair use defense. The judge found that the relevant works – consisting of large-scale screenshots of third parties' Instagram posts, with short comments by Prince underneath – "indeed tested the boundary between appropriation art and copyright infringement."[18]

1.3. The Goldsmith case

In May 2023, SCOTUS issued a ruling on the limits of fair use and transformativeness. In *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith et al*.,[19] SCOTUS held that a silkscreen print of musician Prince created by Andy Warhol based on a photograph by Lynn Goldsmith did not constitute fair use. Goldsmith had taken the photograph in 1981 and subsequently licensed it to *Vanity Fair* magazine. The license approved the one-time use of the photograph as a reference for an illustration by Warhol, to accompany an article on the musician. The article and illustration were published in 1984. However, Warhol created 15 additional copies of the resulting illustration without notifying Goldsmith or asking for her authorization. In 2016, when Condé Nast (*Vanity Fair*'s parent company) licensed one of the additional copies for a retrospective issue on Prince, Goldsmith became aware of the unauthorized copies and alerted the Andy Warhol Foundation (AWF)[20] that this was copyright infringement. The AWF sought a declaratory judgment supporting fair use.

In an unexpected turn of events, SCOTUS sided with Goldsmith rather than the AWF. It held that because the work had the same essential purpose as the original (to illustrate a magazine story about Prince) and the use was commercial in nature, fair use did not apply. The print also lacked transformativeness since changes in comparison with the original were minor and did not imbue it with "a fundamentally different and new artistic purpose or character." Simply changing a work from one medium to another is insufficient to qualify for fair use.[21] This is consistent with earlier decisions by federal courts, which focus on changes in the function and purpose of the new work rather than changes to content, meaning, or expression.[22] It is important to note that the court limited its holding to the work before it and did not overhaul the entire body

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18 S. Cascone, *A Judge Has Greenlit Two Lawsuits Against Appropriation Artist Richard Prince from Photographers Who Say He Stole Their Work*, Artnet News, 2023, https://news.artnet.com/art-world/richard-prince-instagram-fair-use-lawsuit-to-proceed-2301826 [accessed: 2024.07.10].

19 Case No. 21-869, 598 U.S. ___ (2023).

20 The AWF holds the official copyright in Warhol's works, ceded by the artist upon his death.

21 *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith et al*., 11 F.4th 26, 39-39 & 42 (2d Cir. 2021).

22 M. Murray, *Copyright Transformative Fair…*, p. 9.

of law interpreting transformativeness. However, it does appear that in the future, artists will need to demonstrate a higher degree of change from an original work to successfully raise a defense to copyright infringement.

1.4. AI machine learning and fair use

AI systems are now capable of using machine learning to train themselves on existing works and generate outputs based on this input. AI-generated art involves analyzing artworks based on different artistic styles and then mimicking these styles to produce new works.[23] Generative AI models can also receive a text prompt from a human author and produce complex visual works in response. The practice of "scraping," which pulls images and text from across the internet to train AI models, is now at the forefront of the fair use debate.[24] The works being scraped are often protected by copyright, but the authors have not been asked for their authorization or offered compensation for this use. Many times, they are not even aware that their work is being used for this purpose until they see derivative works shared online. This is not limited to artists; the Authors Guild sent an open letter to several AI companies to request credit and fair compensation for the use of their copyrighted works in training generative AI systems.[25]

A group of visual artists filed a class action lawsuit against Stability A.I. in January 2023 to stop the company from scraping copyrighted artwork.[26] The complaint states that this is unlawful infringement, as: "Defendants are using copies of the training images […] to generate digital images and other output that are derived exclusively from the Training Images [sic], and that add nothing new."[27] Furthermore, the claimants allege that by allowing the AI systems to generate art in the style of particular artists, defendants are "siphoning commissions from the artists themselves" and devaluing and diluting the original works. In other words, the AI-generated works are usurping the market for human artistic creations. Claimants are seeking monetary damages as well as permanent injunctive relief to require that the AI image generator training models be modified and exclude copyrighted work.

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23 C. Dee, *Examining Copyright Protection of AI-Generated Art*, "Delphi – Interdisciplinary Review of Emerging Technologies" 2018, no. 1, p. 32.

24 E. Maiberg, *An AI Scraping Tool Is Overwhelming Websites with Traffic*, Vice, 2023, https://www.vice.com/en/article/dy3vmx/an-ai-scraping-tool-is-overwhelming-websites-with-traffic [accessed: 2024.07.10].

25 W. Bedingfield, *The Generative AI Battle Has a Fundamental Flaw*, Wired, 2023 https://www.wired.co.uk/artificial-intelligence-copyright-law?verso=true [accessed: 2024.07.10].

26 *Andersen v. Stability AI Ltd.*, Case No. 23-00201 (N.D. Cal. Jan. 13, 2023); E. Feldman, *Are A.I. Image Generators Violating Copyright Laws?*, Smithsonian Magazine, 2023, https://www.smithsonianmag.com/smart-news/are-ai-image-generators-stealing-from-artists-180981488/ [accessed: 2024.07.10].

27 M. Chen, *A Scientist Has Filed Suit Against the U.S. Copyright Office, Arguing His A.I.-Generated Art Should be Granted Protections*, Artnet News, 2023, https://news.artnet.com/art-world/class-action-lawsuit-ai-generators-deviantart-midjourney-stable-diffusion-2246770 [accessed: 2024.07.10].

In response, defendants have claimed that this is fair use and "[t]o the extent that A.I.s are learning like people, it's sort of the same thing and if the images come out differently then it seems like it's fine."[28] This indicates that the companies believe training AI systems falls within the scope of fair use because it is either for an educational purpose or because the output is transformative. However, this interpretation is contrary to long-standing copyright case law. First, it is well-established that works by machine learning technology do not qualify for copyright protection unless there has been significant participation by a human author. The US has a staunchly anthropocentric view of copyright (discussed in further detail below).[29] Second, under *Goldsmith*, commercial use of an appropriated artwork weighs heavily against a finding of fair use. The educational fair use exception was envisaged to apply in a more traditional scholarly setting, not in a for-profit business setting. While commerciality by itself is not dispositive, when combined with the use of a work to achieve a purpose highly similar or the same to the original, and which is likely to "supplant" the market for the original, the use cannot be considered fair.[30] Third, merely creating works in the style of an established artist is not transformative. An AI-generated work will need to demonstrate significant changes in content, context, function, and purpose to qualify for transformative fair use.[31] Fourth, the claimants have demonstrated that AI is encroaching on their livelihoods and affecting the market for their work.

Comedian Sarah Silverman filed a lawsuit against OpenAI and Meta for copyright infringement on these grounds in July 2023, further bringing the issue to the public's attention.[32] It is highly probable more cases will follow in coming years, given the millions of images being used to train AI systems. These lawsuits are "challenging the very limits of copyright"[33] and the way in which technology and the law intersect. However, some elements of copyright remain firm, such as the requisite of human authorship for copyright protection. This is discussed in the following section.

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28 E. Feldman, *Are A.I. Image Generators Violating…*

29 P. Zurth, *Artificial Creativity? A Case against Copyright Protection for AI-Generated Works*, "UCLA Journal of Law & Technology" 2021, no. 25, pp. 2–3. By contrast, other countries such as the United Kingdom protect purely "computer generated works," awarding copyright to the programmer. *Ibid*., p. 3.

30 M. Murray, *Copyright Transformative Fair…*, pp. 8–10.

31 *Ibid*., p. 19.

32 *Silverman et al. v. OpenAI*, Case No. 3:23-cv-03416 (N.D. Cal. July 7, 2023).

33 W. Davis, *Sarah Silverman is suing Open AI and Meta for copyright infringement*, The Verge, 2023, https://www.theverge.com/2023/7/9/23788741/sarah-silverman-openai-meta-chatgpt-llama-copyright-infringement-chatbots-artificial-intelligence-ai [accessed: 2024.07.10]; J. Vincent, *The scary truth about AI copyright is nobody knows what will happen next*, The Verge, 2022, https://www.theverge.com/23444685/generative-ai-copyright-infringement-legal-fair-use-training-data [accessed: 2024.07.10].

2. Copyright protection for AI works

AI artwork has gained mainstream popularity, prompting various challenges to existing interpretation of copyright law by both the USCO and judicial courts. The two cases presented below demonstrate the contemporary approach to copyright in the AI context, and what is required for protection.

2.2. Dr. Stephen Thaler's a recent entrance to paradise

2.2.1. USCO registration attempts

Dr. Stephen Thaler is a computer scientist and founder of Imagination Engines Incorporated who develops advanced artificial neural network technology (i.e. AI systems) to create AI-generated artworks. Thaler used one of his AI systems, referred to as a "Creativity Machine," to produce a work titled *A Recent Entrance to Paradise* (the "Work"). The Work was generated in 2012 by an algorithm using pictures to create images simulating a near-death experience.[34] In 2018, Thaler filed an application with the USCO to register the Work, identifying himself as the author and copyright claimant. Notably, Thaler also indicated that the Work was "autonomously created by a computer algorithm running on a machine." but that he was entitled to copyright ownership through the work for hire doctrine. In 2019, the USCO denied registration on the grounds of lack of human authorship.[35] Thaler filed for reconsideration, admitting that the Work lacked "traditional human authorship but arguing that it nonetheless qualified for copyright protection." After re-evaluating the claim, in 2020 the USCO reiterated that human authorship is a key requirement for copyright law, and protection is limited to works resulting from "the fruits of intellectual labor […] founded in the creative powers of the mind," according to long-standing interpretation of legal precedent.[36] Thaler had also failed to provide evidence of "sufficient creative input or intervention by a human author in the Work," which was necessary for registration.[37]

Thaler asked for reconsideration a second time, arguing that the initial refusal was "unconstitutional and unsupported by either statute or case law" and arguing that the USCO "'should' register copyrights in machine-generated works because doing so would 'further the underlying goals of copyright law'." He relied on three points: 1) there is no explicit provision prohibiting copyright for computer-generated

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[34] E. Kinsella, *A Court Shot Down a Computer Scientist's Latest Attempt to Copyright an A.I.-Created Artwork in a Case That Has Big Implications for A.I. Artists*, Artnet News, 2023, https://news.artnet.com/art-world/court-shot-down-ai-art-copyright-again-2352452 [accessed: 2024.07.10].

[35] https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf [accessed: 2024.07.10].

[36] *Ibid*., p. 3.

[37] U.S. Copyright Office, Compendium of U.S. Copyright Practices § 306 (3d ed. 2021). See also 17 U.S.C. § 410(b): The Register of Copyrights has the authority to cancel any registration where the "material deposited does not constitute copyrightable subject matter" or "the claim is invalid for any other reason."

artworks; 2) the Copyright Act allows non-human entities to be considered as authors under the work for hire doctrine; and 3) the USCO was relying on outdated judicial opinions. The USCO, through a three-person review board ("Board"), affirmed the earlier ruling in 2022. It reiterated that works "produced by a machine or mere mechanical processes" operating "without any creative input or intervention from a human author" are exempt from registration.[38] Moreover, it stressed that Thaler had failed to assert that the Work was created with contribution from a human author, and thus the remaining issue before the Board was whether the human authorship requirement was unconstitutional and unsupported by case law. After examining the Copyright Act, the Constitution, and judicial interpretations of copyright provisions, the Board determined that the decision was sound. It cited cases where courts repeatedly refused to extend copyright protections to non-human creators, such as a photograph taken by a monkey,[39] a "living garden,"[40] and a song with the Holy Spirit named as the author,[41] as well as another case involving Thaler, holding that an AI system could not claim inventorship of patents.[42]

With respect to Thaler's contention that the Copyright Act was meant to evolve and accept new forms of creative works, the Board examined a report issued by the National Commission on New Technological Uses of Copyrighted Works (CONTU).[43] The report indicated that copyright law did not require amendment in light of new technological developments, as the human authorship requirement was sufficient to protect works created with computers: "the eligibility of any work for protection by copyright depends not upon the device or devices used in its creation, but rather upon the presence of at least minimal human creative effort at the time the work is produced."[44] The USCO's approach was therefore consistent with decades of precedent. While USCO's manual (*Compendium of U.S. Copyright Office Practices*, last updated in 2021) does address works of non-human expression (e.g. derivative sound recordings, x-rays and other visual imaging, hypertext markup language), the focus on human authorship for protection remains consistent. Furthermore, the Board noted that a previous consultation by the US Patent and Trademark Office (USPTO) on whether a work produced solely by AI should qualify for copyright protection received responses overwhelmingly in favor of maintaining the human authorship requirement.[45]

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38 U.S. Copyright Office, Compendium of U.S. Copyright Practices § 312.2 (3d ed. 2021).

39 *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

40 *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011).

41 *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955 (9th Cir. 1997). Here, the court held that "some element of human creativity must have occurred" in order for the work to be copyrightable, because copyright laws were not intended to protect "creations of divine beings."

42 *Thaler v. Hirshfield*, Case No. 1:20-cv-903 (E.D. Va. Sep. 2, 2021).

43 CONTU's mandate is set out in Pub. L. 93-573, § 201(b)(2) (1974).

44 Final Report of the National Commission on New Technological Uses of Copyrighted Works, 1978, pp. 45–46.

45 US Patent and Trademark Office, Public Views on Artificial Intelligence and Intellectual Property, 2020, https://www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pdf [accessed: 2024.07.10].

The Board additionally rejected Thaler's work for hire argument because under the Copyright Act, this type of work must be prepared by either an employee or one or more parties who expressly agree via a binding written contract that the work for hire doctrine shall apply.[46] As a machine, the relevant AI system could not enter into such a contract[47] or be considered an employee. Moreover, a work for hire is not exempt from the Copyright Act's human authorship requirement.

2.2.2. Judicial claim

Having exhausted administrative remedies, Thaler filed a lawsuit against the USCO to compel registration of the Work in June 2022.[48] Thaler alleged that the USCO's decision was "arbitrary, capricious, an abuse of discretion, and not in accordance with the law, unsupported by substantial evidence, and in excess of [its] statutory authority"[49] and argued that this denial "creates a novel requirement for copyright registration that is contrary to the plain language of the Copyright Act."[50] Thaler stressed that the phrase "original work of authorship" was "purposefully left undefined" by Congress,[51] that copyright protection can apply to non-humans (e.g. corporations), that the bar for originality in copyrightable works is low, and that lack of copyright protection for computer-generated works would affect the moral rights of human authors.[52] Thaler further claimed that "AI can autonomously create works indistinguishable from a human being in terms of original and creative output"[53] and that the Work should be copyrightable because a human (i.e. Thaler) selected and arranged the images used for the AI's output, and this was not a purely mechanical or routine process.[54] Under applicable case law, the threshold for creativity in the copyright context is that a work possesses "some creative spark, 'no matter how crude, humble, or obvious it might be'."[55]

The complaint goes on to discuss the work for hire doctrine in more detail, claiming that while "[a]n AI is not a legal person and does not have rights," and therefore cannot own intellectual property, Thaler is entitled to the works it creates as the owner and operator of the relevant AI system. Here, Thaler relies on the theory of accession, where the owner of an original piece of property is entitled to subsequent property that the original creates, such as a tree bearing fruit, as well as his control over the AI system.[56]

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46 Definition of *work for hire* at 17 U.S.C. § 101.

47 Capacity is one of the main requirements in contract law. Unlike corporations, autonomous systems lack legal personhood and therefore cannot enter into contracts or be considered a party to an agreement. See N. Banteka, *Artificially Intelligent Persons*, "Houston Law Review" 2021, no. 58, p. 593.

48 *Thaler v. Perlmutter*, Case No. 1:22-cv-01564 [Complaint], https://www.courtlistener.com/docket/63356475/1/thaler-v-perlmutter/ [accessed: 2024.07.10].

49 E. Kinsella, *A Court Shot Down*…

50 Complaint 5 and 7.

51 Complaint 23, citing H.R. Rep. No. 94-1476, p. 51 (1976).

52 Complaint 29–32.

53 Complaint 36–37.

54 Complaint 39–42.

55 *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 US 340, 345 (1991).

56 Complaint 45–53.

Finally, Thaler claimed that recognition of AI authorship is consistent with the purpose of the Constitution and the Copyright Act, which is to offer authors protection and encourage new works of artistic production.[57]

In August 2023, the district court issued an opinion affirming the USCO's decision and upholding the human authorship requirement.[58] It noted that while copyright is "designed to adapt with the times […] [there] has been a consistent understanding the human creativity is the *sine qua non* at the heart of copyrightability, even as that human creativity is channeled through new tools or into new media."[59] For instance, a photograph is the result of a mechanical device but entails a photographer's creative decisions to "craf[t] the overall image."[60] A human author's ultimate creative control over the work ("guiding hand") is therefore required for copyright protection, even works generated by new forms of technology.[61] The court further stated that the human authorship requirement was based on "centuries of settled understanding" and fully upholds both the Constitution and the Copyright Act, as "[t]here is absolutely no indication that Congress intended to effect any change to this longstanding requirement." Case law holds likewise, and Thaler could not point to any case where "a court has recognized copyright in a work originating with a non-human."[62] Regarding the accession and work for hire theories, Thaler failed to prove an existing and enforceable underlying property right.[63]

Thaler indicated that he plans to appeal this decision, although it is highly unlikely that the court of appeals will rule in his favor. It is worth noting that the district court did acknowledge "new frontiers in copyright as artists put AI in their toolbox to be used in the generation of new visual and other artistic works,"[64] but also that the USCO's decision was based on Thaler's own representations that the AI was the author of the Work, which contradict the long-standing human authorship requirement.[65] Had Thaler played a more active role in the creation of the Work, he might have obtained a different result, as illustrated below.

2.3. Kristina Kashtanova's *Zarya of the Dawn*

In 2022, Kristina Kashtanova applied to the USCO for a copyright registration for a comic titled *Zarya of the Dawn* (the "Work"), which had been created using the AI program

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57 Complaint 57.

58 *Thaler v. Perlmutter*, Case No. 1:22-cv-01564 [Decision], p. 7: "The Register did not err in denying the copyright registration application presented by plaintiff. United States copyright law only protects works of human creation," https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2022cv1564-24 [accessed: 2024.07.10].

59 Decision, p. 8.

60 *Ibid*.

61 *Ibid*.

62 Decision, pp. 9–12.

63 Decision, pp. 14–15.

64 Decision, p. 13.

65 Decision, pp. 13–14.

Midjourney. The application listed Kashtanova as the author and did not disclose the use of AI technology. This registration was approved that same day.[66] However, shortly afterwards, the USCO became aware that Kashtanova had used Midjourney[67] and requested additional information on the extent of her authorship of the Work. Kashtanova's attorney sent a letter dated November 21, 2022 describing her use of Midjourney "merely as an assistive tool" and asserting that she had authored the text of the Work in its entirety.[68] On February 21, 2023, the USCO concluded that Kashtanova was indeed "the author of the Work's text as well as the selection, coordination, and arrangement of the Work's written and visual elements," but that the images generated through Midjourney were not the product of human authorship and thus outside the scope of copyright.[69] The USCO notified Kashtanova that it would proceed to cancel the original registration and issue a new certificate limited to "the expressive material that she created."[70] It then proceeded to analyze the Work by its constituent parts.

First, with respect to the text, which was drafted entirely by Kashtanova, the USCO found that it qualified for copyright protection as the work of a human author. Second, the selection and arrangement of the images and text qualify for protection as a compilation, since copyright protects "the collection and assembling of preexisting materials […] that are selected, coordinated, or arranged […] in a sufficiently creative way."[71] Kashtanova demonstrated that her selection of text and visual elements was the result of a creative choice. Third, the USCO considered the use of Midjourney to generate the individual images. Midjourney uses text commands ("prompts") that describe the type of image to be generated. Users also have the option to include images from other sources to influence the output or parameters directing aspect ratios or functional directions. But Midjourney "does not interpret prompts as specific instructions to create a particular or expressive result."[72] The USCO determined that because it is not possible to predict what Midjourney will create ahead of time – it is a random rather than controlled process – the images were not original works of authorship protected by copyright. Although Kashtanova stated that she guided the structure and content of the images, the USCO held that Midjourney originated "the traditional elements of authorship;"[73] she was not "the inventive or master mind" behind the images.[74] Despite Kashtanova's efforts working with Midjourney, the prompts were seen as suggestions, not orders. The USCO does not consider "the amount of time,

66 https://www.copyright.gov/docs/zarya-of-the-dawn.pdf [Letter] [accessed: 2024.07.10], p. 2.
67 R. Lawler, *The US Copyright Office says you can't copyright Midjourney AI-generated images*, The Verge, 2023, https://www.theverge.com/2023/2/22/23611278/midjourney-ai-copyright-office-kristina-kashtanova [accessed: 2024.07.10].
68 Letter, pp. 2–3.
69 Letter, p. 1.
70 *Ibid*.
71 17 U.S.C. § 101.
72 Letter, p. 7.
73 Letter, p. 8.
74 Letter, p. 9.

effort, or expense required to create the work" as justification for copyright protection, because it is not related to the necessary "minimum creative spark."[75]

While this was not the outcome Kashtanova preferred, the decision was hailed as "a great victory," since the USCO recognized that generative AI and creativity can coexist.[76] The decision also leaves the door open for future works using AI to be copyrighted, if the applicant can prove that they used another program and exerted greater decision-making over the image output.

2.4. Lessons learned

When comparing the different outcomes of these cases, it is important to note who was identified as the relevant author in the original application for copyright registration with the USCO. Thaler did not claim to be the author of *A Recent Entrance to Paradise*, but rather listed his "Creativity Machine" as the primary creator. Thaler later attempted to highlight his control over the AI system in order to meet the human authorship requirement. The USCO did not approve, and seemingly felt Thaler was improperly using false information to obtain a registration certificate. While at first glance it appears that the USCO's approach to the *Zarya of the Dawn* registration contradicts the outcome of the Thaler registration, a closer examination of the decision letter provides valuable insight. Unlike Thaler, Kashtanova was able to demonstrate a human element present in the Work and did not list the AI system as the author.

In March 2023, the USCO issued a new rule to provide guidance for the registration of AI-generated works.[77] The rule specifically references Thaler's and Kashtanova's registrations and replicates the case law and principles set out in the related decisions. This approach was confirmed in September 2023, when the USCO declined to register an AI-generated work submitted by Jason Allen titled *Théâtre d'Opéra Spatial*. Although Allen "emphasized his hand in the work" (entering prompts, making adjustments, and dictating the tone of the image),[78] his use of Midjourney undermined these claims. Notably, the work had previously won first prize at the 2022 Colorado state art fair and caused controversy when Allen revealed that he had used AI to create the winning piece.[79]

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75 Letter, p. 10.

76 T. Analla, *Zarya of the Dawn: How AI is Changing the Landscape of Copyright Protection*, Harvard University Jolt Digest, 2023, https://jolt.law.harvard.edu/digest/zarya-of-the-dawn-how-ai-is-changing-the-landscape-of-copyright-protection [accessed: 2024.07.10].

77 https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright-registration-guidance-works-containing-material-generated-by-artificial-intelligence [accessed: 2024.07.10].

78 A. Schrader, *Another A.I.-Generated Artwork Was Denied Copyright Protection, Adding a New Knot to the Complexities of Creative Ownership*, Artnet News, 2023, https://news.artnet.com/art-world/ai-art-copyright-2367590 [accessed: 2024.07.10].

79 D. Batycka, *An A.I.-Generated Artwork Won First Prize at a Colorado State Fair. Human Artists are Infuriated*, Artnet News, 2022, https://news.artnet.com/art-world/colorado-artists-mad-ai-art-competition-2168495 [accessed: 2024.07.10].

Thaler claims that the USCO's approach will result in "orphaned art" and "an increasing number of artists and inventors will [take] credit for the efforts of creative A.I., and in that process, creat[e] chaos."[80] It is true that there is no uniform test in the US to gauge what level of human participation is considered sufficient to merit copyright protection, and it has been suggested that the USCO should consult artists in these determinations, as they raise issues that affect a wider group of people and rights as well as the role of AI itself in society, whether as a tool or putative creator.[81] Nonetheless, the USCO is taking the matter seriously, as it has launched an initiative to examine copyright law and policy issues raised by AI, including the scope of copyright in AI-generated works and the use of copyrighted materials to train AI systems.[82] As this consultation is ongoing, the results are not available, but it represents a meaningful step towards informed regulation of AI in the copyright context, which is sorely needed.

3. NFTs and trademark infringement

NFTs, or non-fungible tokens, are "digital equivalents of rare artworks, collectible trading cards, and other assets that gain value from scarcity." Unlike other digital assets, NFTs are not interchangeable and represent a one-of-a-kind object.[83] NFTs are created by minting (i.e. recording) a file on a blockchain ledger. This proves the ownership and authenticity of the unique digital asset. Unlike tangible works of art, the owner of an NFT does not obtain ownership through the physical possession of the object; rather, the NFT itself acts as a certificate of ownership.[84] The sale of an NFT does not necessarily include the underlying IP rights, whether of the NFT itself or the physical or digital work it is based on. These rights can be transferred or licensed, but the relevant rights holder must agree to do so. NFTs became hugely popular in 2021, as sales on specialized platforms and in high-profile auction houses reached an unprecedented $11.1 billion and $230 million, respectively.[85] Therefore, NFTs involve a large portion of the marketplace and the consumers in it, falling within the scope of trademark law.

Trademarks involve "the right to own and exclusively control the use of a signifier of goods or services in commerce."[86] Under US law, the main purpose of trademark protection is to prevent customer confusion as regards the origin and quality of goods and services in the marketplace.[87] Here, registration is necessary to obtain the exclusive

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80 A. Schrader, *Another A.I.-Generated Artwork*…

81 *Ibid.*

82 https://www.copyright.gov/ai/ [accessed: 2024.07.10].

83 J. Fairfield, *Tokenized: The Law of Non-Fungible Tokens and Unique Digital Property*, "Indiana Law Journal" 2022, no. 97, pp. 1261–1263.

84 R. Carroll, *NFTs: The Latest Technology Challenging Copyright Law's Relevance Within a Decentralized System*, "Fordham Intellectual Property, Media and Entertainment Law Journal" 2022, no. 32, p. 981.

85 C. McAndrew, *The Art Market Report 2023*…, pp. 14 and 16.

86 M. Murray, *Trademarks, NFTs, and the Law of the Metaverse*, "Research Gate" 2022, p. 3.

87 *Ibid*., citing *Int'l Info. Sys. v. Sec. Univ., LLC*, 823 F.3d 153, 161 (2d Cir. 2016).

right to use the mark and to establish a legal presumption of the mark's validity and ownership.[88] To obtain nationwide protection, the applicant must show that the mark is used in more than one state. Commerce rather than creativity is the main factor for trademark protection. Note that commercial use in this context includes a situation in which a person could receive some benefit or advantage, even if it is limited or accidental; "a large or obvious profit motive is not required."[89]

A key inquiry in trademark infringement is whether the items are "likely to confuse a substantial number of consumers into incorrectly thinking [they] originated from or were endorsed by the trademark holder."[90] While the test for likelihood of confusion may vary according to the circuit where the court is located, factors typically include: 1) the strength of the original trademark; 2) the degree of similarity between the marks; 3) intent (bad faith); 4) evidence of actual confusion; and 5) the level of consumer sophistication in the marketplace.[91] The Lanham Act also provides for dilution, defined as a use of a mark or trade name that is likely to blur or tarnish the distinctive power of the mark as an identifier of goods.[92] In practice, both these provisions allow trademark owners to object to critical treatment of their marks, including parody. Trademark fair use is more limited than copyright fair use and is tied to consumer confusion.[93]

3.1. MetaBirkins

Mason Rothschild created faux-fur versions of the iconic Birkin bag (labelled "MetaBirkins") and sold them online as a collection of 100 NFTs valued at $125 each. Although Rothschild disclaimed any affiliation with Hermès on his website, the luxury brand filed suit for trademark infringement and dilution in June 2022.[94] Rothschild claimed fair use because the NFTs were artistic renderings and not actual handbags or images of actual handbags. Hermès countered that it "did not authorize or consent to the commercialization or creation" of the NFTs and that Rothschild's actions were diluting its power as a name brand in the marketplace.[95] Notably, marks do not need to be identical to cause confusion; it is enough for them to be similar and "create the same general commercial impression in the consuming public's mind."[96] In June 2023, the jury found Rothschild liable despite his freedom of expression claims, holding that

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88 M. Yoder, *An "OpenSea" of Infringement: The Intellectual Property Implications of NFTs*, "The University of Cincinnati Intellectual Property and Computer Law Journal" 2022, no. 6, p. 11.

89 M. Murray, *Trademarks, NFTs*…, p. 4.

90 A. Michaels, *NFT Litigation is Raising Novel Trademark Questions*, "Social Science Research Network (SSRN)" 2022, p. 1.

91 *Ibid.*

92 Section 43(c).

93 M. Murray, *Trademarks, NFTs*…, p. 8.

94 *Hermès International and Hermès of Paris, Inc. v. Mason Rothschild*, Case No. 22-cv-384 (SDNY Feb. 2, 2023), 590 F.Supp. 3d 647, 655 (SDNY 2022).

95 C. Muraca, *The 'MetaBirkin' and the Beginning of Trademark Litigation in the NFT Space*, Cardozo University AELJ Blog, 2022, p. 3, https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1307&context=aelj-blog [accessed: 2024.07.10].

96 M. Yoder, *An "OpenSea" of Infringement*…, pp. 11–12.

there was a likelihood of consumer confusion and that he had intended to defraud consumers. It awarded Hermès a permanent injunction against Rothschild, preventing him from marketing and selling the NFTs, and $133,000 in damages.[97]

3.2. Bored Ape Yacht Club (BAYC)

BAYC are some of the most popular NFTs in circulation and have sold for millions of dollars, with the entire collection previously valued at $1 billion.[98] The content license for this collection expressly includes the right to display and create derivative works using the BAYC characters and brand. The BAYC parent company, Yuga Labs, filed a lawsuit against conceptual artists Ryder Ripps and Jeremy Cahen after they created NFTs using the exact same images as the authentic BAYC NFTs, with the same designated numbers and trademarked elements.[99] The only difference was the title "RR/BAYC" instead of BAYC and that the NFTs were sold for a lower price. Allegedly, the images were duplicated as a satiric and artistic statement, but in April 2023 the court ruled that the copied NFTs were "no more artistic than the sale of a counterfeit handbag" and did not "contain any artistic expression or critical commentary." Even though NFTs represent a new type of asset and the extent of their IP protection is still being determined, the court cited Yuga Labs' terms and conditions, which specifically stated that BAYC NFT holders obtained a copyright license for personal and commercial use but not a trademark license. It also cited the MetaBirkins case and confirmed that intangible goods qualify for trademark protection.[100]

3.3. Lessons learned

These cases demonstrate how existing law can be applied successfully to new technologies, by following basic principles rather than by focusing on the differences between these types of assets and traditional physical goods. They also provide established precedent for future cases to follow, in contrast to copyright infringement cases over NFTs, which are either ongoing or have settled prior to the dispositive motion stage.[101] Interestingly, trademark infringement appears to be a more straightforward

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97 A. Greenberger, *Hermès Wins Lawsuit Against Artist, Whose NFTs Based on Birkin Bags Were Deemed Not Art by Jury*, ARTnews, 2023, https://www.artnews.com/art-news/news/hermes-wins-metabirkins-lawsuit-mason-rothschild-nfts-1234656620/ [accessed: 2024.07.10]; B. Brittain, *Hermes wins permanent ban on 'MetaBirkin' NFT sales in US lawsuit*, Reuters, 2023, https://www.reuters.com/business/hermes-wins-permanent-ban-metabirkin-nft-sales-us-lawsuit-2023-06-23/ [accessed: 2024.07.10].

98 I. Lee, *Sales of Bored Ape Yacht Club NFTs jump past $1 billion amid heightened interest from celebrity collectors*, Markets Insider, 2022, https://www.businessinsider.in/investment/news/sales-of-bored-ape-yacht-club-nfts-jump-past-1-billion-amid-heightened-interest-from-celebrity-collectors/articleshow/88696528.cms [accessed: 2024.07.10].

99 *Yuga Labs, Inc. v. Ryder Ripps*, No. 2:22-cv-04355 (C.D. Cal. June 24, 2022).

100 E. Roth, *Bored Ape Yacht Club creator wins lawsuit over copycat NFT collection*, The Verge, 2023, https://www.theverge.com/2023/4/24/23695703/bored-apes-creator-lawsuit-nfts-ryder-ripps-yuga-labs-trademark-copyright [accessed: 2024.07.10].

101 For example, in September 2022 director Quentin Tarantino settled with studio Miramax over a set of NFTs based on the film *Pulp Fiction*. A. Robertson, *Quentin Tarantino settles NFT lawsuit with*

matter than copyright infringement with respect to NFTs. This is likely because artistic creations are more subjective, while commercial goods fall under trademark protection on a more objective basis. "Recontextualization" or similar artistic justifications may succeed as a defense to accusations of copyright infringement, but the court rejected this argument in the MetaBirkins and BAYC cases. Parody, commentary, and criticism may also be raised, but US courts tend to err on the side of customer confusion rather than freedom of expression in this context.[102] For instance, if Rothschild had not used the Birkin name for his NFTs, and instead called them something else, it is possible that Hermès would have been unable to demonstrate consumer confusion (and by extension, trademark dilution and infringement).

Conclusion

New forms of technology, particularly AI, raise interesting (and sometimes complicated) IP issues. The US frames copyright in relation to fair use and transformativeness, while AI is testing the limits of these concepts. Various lawsuits have been filed opposing the use of copyrighted materials to train AI systems, with defendants alleging that this falls within the scope of fair use. But a hallmark SCOTUS case evaluating what constitutes transformativeness would seem to discredit this theory. Moreover, the issue of whether AI-generated artworks qualify for copyright protection is subject to the human authorship requirement. US copyright law enshrines creativity, and this is something AI cannot replicate: "Machines do not reflect the zeitgeist, do not process social and societal impressions, and do not get inspired on subconscious levels. Yet […] this is a crucial factor for copyright protection [in the US]. The mere fact that AI technology has the ability to surprise […] even those who programmed and trained it does not necessarily amount to creativity."[103] Works can merit protection if applicants can demonstrate that they, rather than the AI, made key decisions leading to the final form of the work. It is also worth considering that "NFTs do not warp the rules of trademark and unfair competition laws, but they do provide a whole new platform in which to use and potentially infringe on or dilute existing marks" and "NFTs cannot automatically be characterized as artistic expression or any kind of expression."[104] This means that they qualify for trademark protection, which can be a more effective means of legal enforcement than copyright infringement, as the fair use analysis will be more strict.

Ongoing developments in the field of IP protection in the US serve as a roadmap for how new technologies interact with established legal orders. The cases discussed

Miramax, The Verge, 2022, https://www.theverge.com/2022/9/9/23344441/quentin-tarantino-pulp-fiction-nft-miramax-lawsuit-settled [accessed: 2024.07.10].

102 M. Murray, *Trademarks, NFTs*…, p. 8.

103 P. Zurth, *Artificial Creativity?*…, p. 5.

104 M. Murray, *Trademarks, NFTs*…, p. 16.

in this article provide examples of approaches that apply existing precedent while adapting it to contemporary needs. As new claims continue to arise, it remains to be seen how and to what extent IP law will continue to evolve in the face of rapidly changing digital assets and tools.

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Summary

Claudia S. Quiñones Vilá

Contemporary Approaches to IP Protection: Developments in the US Art Market

This article examines recent developments in United States (US) intellectual property (IP) law that directly affect the art market, namely: 1) the judicial interpretation of fair use and the use of copyrighted material to train AI systems; 2) the US Copyright Office's refusal to register certain AI-generated works; and 3) the application of trademark law to NFTs (Non-fungible tokens). The aim of this article is to provide an overview of the constantly evolving legal landscape in this field while highlighting controversies that will likely continue to arise in the near future. As a jurisdiction where new technologies, the art market, and IP case law overlap, the US is in a unique position to reflect ongoing changes as well as in-depth interpretations of existing provisions.

Keywords: artificial intelligence, art market, copyright, NFTs, trademarks.

Streszczenie

Claudia S. Quiñones Vilá

Współczesne koncepcje ochrony własności intelektualnej – zmiany na rynku dzieł sztuki w USA

Niniejszy artykuł analizuje ostatnie zmiany w amerykańskim prawie własności intelektualnej, które mają bezpośredni wpływ na rynek sztuki, a mianowicie: 1) sądową interpretację dozwolonego użytku i wykorzystania materiałów chronionych prawem autorskim do szkolenia systemów sztucznej inteligencji; 2) odmowę rejestracji niektórych utworów generowanych przez sztuczną inteligencję przez amerykański urząd ds. praw autorskich oraz 3) zastosowanie prawa znaków towarowych do NFT. Celem pracy jest przedstawienie przeglądu stale ewoluującego krajobrazu prawnego w tej dziedzinie, przy jednoczesnym podkreśleniu kontrowersji, które będą nadal pojawiać się w najbliższej przyszłości. Jako jurysdykcja, w której nowe technologie, rynek sztuki i orzecznictwo dotyczące własności intelektualnej nakładają się na siebie, Stany Zjednoczone są w wyjątkowej sytuacji, która umożliwia odzwierciedlenie bieżących zmian, a także dogłębną interpretację istniejących unormowań.

Słowa kluczowe: sztuczna inteligencja, rynek sztuki, prawo autorskie, NFT, znaki towarowe.