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US Copyright Office Grants Limited Registration for AI-Generated Graphic Novel

February 28, 2023

On February 21, 2023, the US Copyright Office (USCO) issued a decision limiting a copyright registration for "Zarya of the Dawn," a graphic novel comprised in part of images created with the assistance of an artificial intelligence platform. The decision has potentially significant implications for the protectability of AI-generated expressive works.

Background

The author, Kris Kashtanova, first obtained a copyright registration for the 18-page graphic novel on September 15, 2022. Kashtanova has described the work, which features original text alongside striking images of the main character in various post-apocalyptic landscapes, as the "adventure of a non-binary person (Zarya) in different worlds" seeking to "find connection with other people and creatures." However, the registration faced potential cancellation after the USCO learned of statements by Kashtanova to the effect that the graphic novel was created using artificial intelligence. The USCO currently interprets the Copyright Act to protect only **human** works of authorship and, according to the "Compendium of U.S. Copyright Office Practices (Third Edition)," it "will refuse to register a claim if it determines that a human being did not create the work." The USCO invited Kashtanova to submit arguments showing good cause why the registration should be maintained.

In a letter brief filed in November by Kashtanova's lawyers at Taylor English Duma and Open Advisory Services, Kashtanova claimed authorship of the entirety of "Zarya," notwithstanding use of AI platform Midjourney to generate each individual image panel. Kashtanova argued that use of Midjourney is similar to other technologies that artists employ to create expressive works, such as cameras. Kashtanova, who uses they/them pronouns, claimed that the prompts they input into Midjourney determined the "poses and points of view, and the juxtaposition of the various visual elements within each picture," not unlike how a photographer selects and frames the subject of a photograph.

Kashtanova further argued that each image was the result of a creative process in which they guided Midjourney iteratively through hundreds of variations of intermediate images until a desired result was achieved, and that some images were even refined by Kashtanova more directly by using Adobe Photoshop. Kashtanova also contended, in the alternative, that even if some individual images were determined to be unprotectable, the graphic novel as a whole still could be protected as a compilation. Under 17 USC § 101, protection for a compilation extends to the selection, coordination, and arrangement of preexisting materials or data, regardless of whether the constituent elements are individually protectable.

USCO's decision affords limited protection

The USCO ultimately agreed that Kashtanova's original text was protectable and that "Zarya" as a whole constituted a protectable compilation, but disagreed that the individual images were entitled to copyright protection. The USCO concluded that, based on the limited record before it, and its current understanding of the Midjourney platform and how Kashtanova used it, Kashtanova lacked sufficient control over the resulting output to qualify as an author. The USCO also determined that although image editing performed by Kashtanova could, in theory, receive protection, the modifications identified in the record were either too limited or had not been described with enough specificity for the USCO to evaluate them.

Is this the final word?

The USCO's letter may not be the final word on the scope of protection for "Zarya," however. Pursuant to 37 CFR § 202.5, Kashtanova is entitled to request reconsideration of the USCO's determination and has indicated

publicly that they intend to respond. In any event, other parties are likely to renew and elaborate on Kashtanova's arguments – and make new arguments in support of claiming copyright protection for their own AI-assisted works. Notably, the USCO has yet to consider related ownership issues, including whether the company that creates and operates an AI platform may be regarded as the author of AI-assisted output it generates (akin to a commissioned artist), the possibility of co-authorship (between user and platform), the authorship implications of including user-generated images in prompts, or circumstances in which a claimant has documented more direct control over the specific contents of AI-assisted output.

Practical considerations

For now, users of generative AI platforms should be mindful of the USCO's decision around protection of AI-assisted works other than as components of a compilation. There is a risk that such works will be deemed unprotectable by the USCO, at least in part. Companies and individuals wanting to avail themselves of copyright protection in works created with the aid of AI platforms should carefully document steps undertaken to dictate the specific contents of the work, including the extent of any expressive contributions added to AI-assisted output.

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