

In re Zarya of the Dawn,
#Vau001480196 (U.S. Copyright
Office, Feb. 21, 2023)





United States Copyright Office

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February 21, 2023

Van Lindberg
Taylor English Duma LLP
21750 Hardy Oak Boulevard #102
San Antonio, TX 78258

Previous Correspondence ID: 1-5GB561K

Re: Zarya of the Dawn (Registration # VAu001480196)

Dear Mr. Lindberg:

The United States Copyright Office has reviewed your letter dated November 21, 2022, responding to our letter to your client, Kristina Kashtanova, seeking additional information concerning the authorship of her work titled *Zarya of the Dawn* (the “Work”). Ms. Kashtanova had previously applied for and obtained a copyright registration for the Work, Registration # VAu001480196. We appreciate the information provided in your letter, including your description of the operation of the Midjourney’s artificial intelligence (“AI”) technology and how it was used by your client to create the Work.

The Office has completed its review of the Work’s original registration application and deposit copy, as well as the relevant correspondence in the administrative record.¹ We conclude that Ms. Kashtanova is the author of the Work’s text as well as the selection, coordination, and arrangement of the Work’s written and visual elements. That authorship is protected by copyright. However, as discussed below, the images in the Work that were generated by the Midjourney technology are not the product of human authorship. Because the current registration for the Work does not disclaim its Midjourney-generated content, we intend to cancel the original certificate issued to Ms. Kashtanova and issue a new one covering only the expressive material that she created.

The Office’s reissuance of the registration certificate will not change its effective date—the new registration will have the same effective date as the original: September 15, 2022. The public record will be updated to cross-reference the cancellation and the new registration, and it will briefly explain that the cancelled registration was replaced with the new, more limited registration.

¹ The Office has only considered correspondence from Ms. Kashtanova and her counsel in its analysis. While the Office received unsolicited communications from third parties commenting on the Office’s decision, those communications were not considered in connection with this letter.

I. DESCRIPTION OF THE WORK

As described in the application and accompanying deposit materials provided by Ms. Kashtanova, the Work is a “comic book” consisting of eighteen pages, one of which is a cover. The cover page consists of an image of a young woman, the Work’s title, and the words “Kashtanova” and “Midjourney.” The remaining pages consist of mixed text and visual material. A reproduction of the cover page and the second page are provided below:



II. SUMMARY OF ADMINISTRATIVE RECORD

On September 15, 2022, Ms. Kashtanova submitted an application for the Work and copies of each page of the Work as the deposit copy. In her application, Ms. Kashtanova listed the author of the Work as “Kristina Kashtanova” and stated that she had created a “[c]omic book.” The application did not disclose that she used artificial intelligence to create any part of the Work, nor did she disclaim any portion of the Work.² The Office reviewed the application on the same day and registered the Work as registration number VAu001480196.

Shortly after registering the Work, the Office became aware of statements on social media attributed to Ms. Kashtanova that she had created the comic book using Midjourney artificial intelligence. Because the application had not disclosed the use of artificial intelligence,

² As we explained in our previous letter, while the word “Midjourney” appears on the cover page of the Work, there is no indication of the intent or meaning of the word on the cover. Letter from U.S. Copyright Office to Kristina Kashtanova at 2 (Oct. 28, 2022).

the Office determined that the application was incorrect, or at a minimum, substantively incomplete. In a letter dated October 28, 2022, the Office notified Ms. Kashtanova that it intended to cancel the registration unless she provided additional information in writing showing why the registration should not be cancelled.³ Letter from U.S. Copyright Office to Kristina Kashtanova (Oct. 28, 2022).

On November 21, 2022, the Office received a timely response from Ms. Kashtanova's attorney, Mr. Van Lindberg. Letter from Van Lindberg, Taylor English Duma LLP, to U.S. Copyright Office (Nov. 21, 2022) ("Kashtanova Letter"). The letter describes Ms. Kashtanova's creation of the Work, including specific information about her use of Midjourney. Mr. Lindberg argues that the Work's registration should not be cancelled because (1) Ms. Kashtanova authored every aspect of the work, with Midjourney serving merely as an assistive tool, and, (2) alternatively, portions of the work are registrable because the text was authored by Ms. Kashtanova and the Work is a copyrightable compilation due to her creative selection, coordination, and arrangement of the text and images.

III. DISCUSSION

A. Legal Standards

Before turning to our analysis of the Work, we summarize here the legal principles that guide that analysis. The Copyright Act defines the scope of copyright protection. Under the Act, a work may be registered if it qualifies as an "original work[] of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). The Supreme Court has explained that the term "original" in this context consists of two components: independent creation and sufficient creativity. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author. *Id.* Second, the work must possess sufficient creativity. *Id.* Only a modicum of creativity is necessary, but the Supreme Court has ruled that some works—such as the alphabetized telephone directory at issue in *Feist*—fail to meet even this low threshold. *Id.* The Court observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity." *Id.* at 363. It found that there can be no copyright in a work in which "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359.

Courts interpreting the phrase "works of authorship" have uniformly limited it to the creations of human authors. For example, in *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court held that photographs were protected by copyright because they were "representatives of original intellectual conceptions of the author," defining authors as "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature." 111 U.S. 53, 57–59 (1884). In doing so, the Court rejected the argument that a photograph was merely "a reproduction on paper of the exact features of some natural object or of some person" made by a machine. *Id.* at 56. But the Court explained that if photography was

³ Under 37 C.F.R. § 201.7(c)(4), if the Office becomes aware that an issued registration does not satisfy the statutory requirements for copyright "or that information essential to registration has been omitted entirely from the application or is questionable," the Office will correspond with the copyright claimant "in an attempt to secure the required information . . . or to clarify the information previously given on the application." If the claimant does not reply in 30 days, the Office will cancel the registration. *Id.*

a “merely mechanical” process, “with no place for novelty, invention or originality” by the human photographer, then “in such case a copyright is no protection.” *Id.* at 59.⁴

In cases where non-human authorship is claimed, appellate courts have found that copyright does not protect the alleged creations. For example, the Ninth Circuit held that a book containing words “‘authored’ by non-human spiritual beings” can only gain copyright protection if there is “human selection and arrangement of the revelations.” *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955, 957–59 (9th Cir. 1997). The *Urantia* court held that “some element of human creativity must have occurred in order for the Book to be copyrightable” because “it is not creations of divine beings that the copyright laws were intended to protect.” *Id.*

The Office’s registration practices follow and reflect these court decisions. The Office collects its understanding of the law in the *Compendium of U.S. Copyright Office Practices (Third Edition)*, which provides standards for examining and registering copyrighted works. Following the cases described above, the *Compendium* explains that the Office “will refuse to register a claim if it determines that a human being did not create the work.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (3d ed. 2021) (“COMPENDIUM (THIRD)”) (providing examples of works lacking human authorship such as “a photograph taken by a monkey” and “an application for a song naming the Holy Spirit as the author of the work”).⁵

Having considered the requirements for copyright protection, the Office turns to the elements of the Work as described in your letter.

B. The Work’s Text

The Office agrees that the text of the Work is protected by copyright. Your letter states that “the text of the Work was written entirely by Kashtanova without the help of any other source or tool, including any generative AI program.” Kashtanova Letter at 2. Based on this statement, the Office finds that the text is the product of human authorship. Moreover, the Office finds that the text in the Work contains more than the “modicum of creativity” required for protection under *Feist*. See 499 U.S. at 346. For this reason, the text of the Work is registrable.⁶

⁴ This echoed the Court’s decision five years earlier in the *Trade-Mark Cases*, which noted that “the writings which are to be protected [under the Copyright Clause] are the fruits of intellectual labor, embodied in the form of books, prints, engravings and the like.” 100 U.S. 82, 94 (1879). The Court’s later cases have similarly articulated a nexus between human expression and copyright. In *Mazer v. Stein*, the Court cited *Sarony* for the proposition that a work “must be original, that is, the author’s tangible expression of his ideas.” 347 U.S. 201, 214 (1954). And in *Goldstein v. California*, the Court again cited *Sarony* for the proposition that “[w]hile an ‘author’ may be viewed as an individual who writes an original composition, the term, in its constitutional sense, has been construed to mean an ‘originator,’ ‘he to whom anything owes its origin.’” 412 U.S. 546, 561 (1973).

⁵ The Office has refused to register a visual work created autonomously by an AI. See U.S. Copyright Office Review Board, *Decision Affirming Refusal of Registration of A Recent Entrance to Paradise* (Feb. 14, 2022), <https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf>.

⁶ The Work is described as “an adaption of Kashtanova’s original story about Zarya.” Kashtanova Letter at 3–4. This would make the Work a derivative of the original story and require that the Work contain separate textual authorship from the story that is itself sufficiently creative for copyright protection. See COMPENDIUM (THIRD)

C. The Selection and Arrangement of Images and Text

The Office also agrees that the selection and arrangement of the images and text in the Work are protectable as a compilation. Copyright protects “the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged” in a sufficiently creative way. 17 U.S.C. § 101 (definition of “compilation”); *see also* COMPENDIUM (THIRD) § 312.1 (providing examples of copyrightable compilations). Ms. Kashtanova states that she “selected, refined, cropped, positioned, framed, and arranged” the images in the Work to create the story told within its pages. Kashtanova Letter at 13; *see also id.* at 4 (arguing that “Kashtanova’s selection, coordination, and arrangement of those images to reflect the story of Zarya should, at a minimum, support the copyrightability of the Work as a whole.”). Based on the representation that the selection and arrangement of the images in the Work was done entirely by Ms. Kashtanova, the Office concludes that it is the product of human authorship. Further, the 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 Ms. Kashtanova’s authorship of the overall selection, coordination, and arrangement of the text and visual elements that make up the Work.

D. The Individual Images

Turning to the individual images in the Work, the Office must consider the impact of Ms. Kashtanova’s use of Midjourney’s artificial intelligence technology in its copyrightability analysis. The majority of the Kashtanova Letter focuses on how Ms. Kashtanova used Midjourney to create these images. Before addressing the question of whether the images are copyrightable, the Office describes its understanding of Midjourney and how it works. The Office’s understanding is based on the letter’s description of the artificial intelligence service,⁷ the Office’s own knowledge, and Midjourney’s public documentation, of which the Office takes administrative notice.⁸

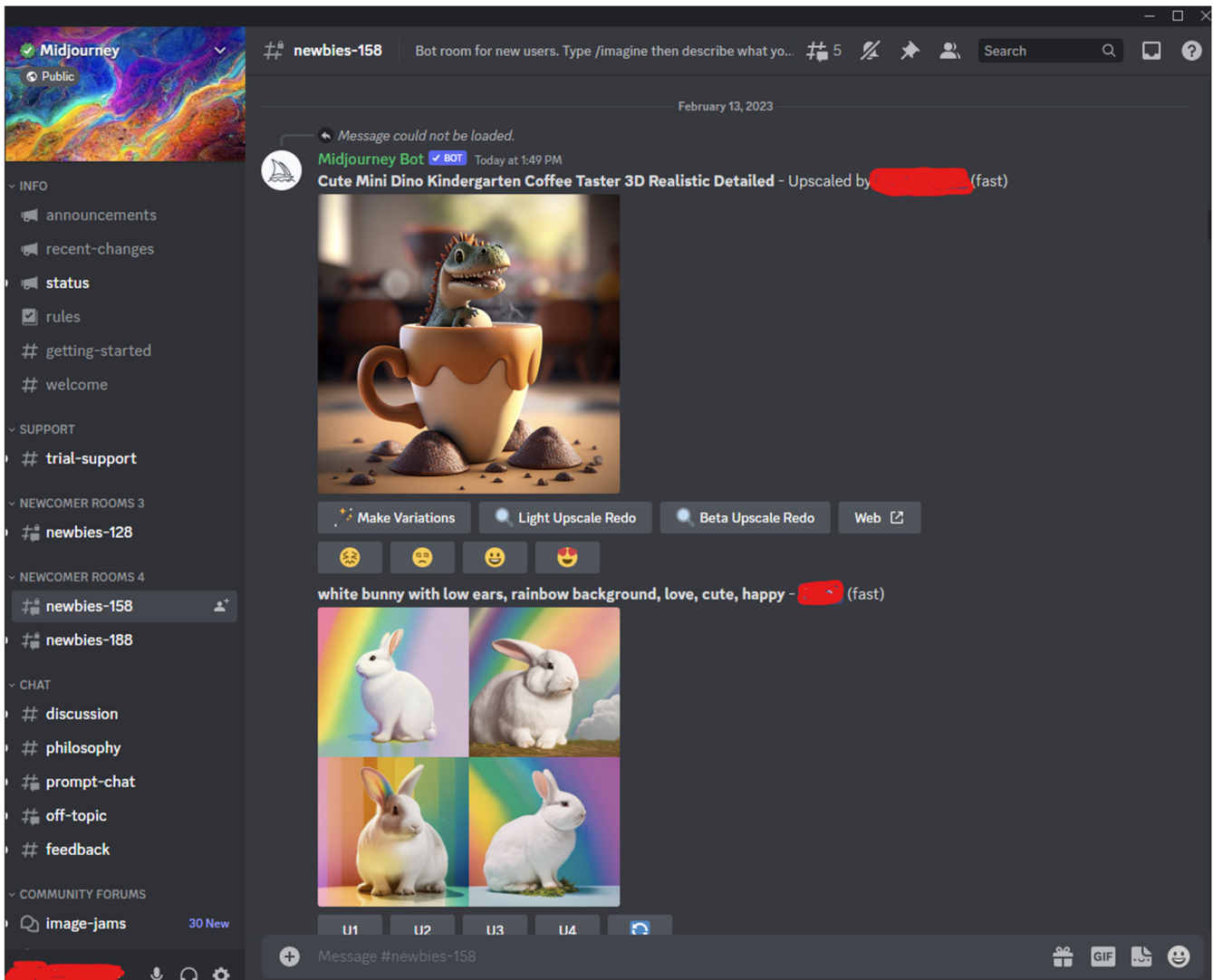
§§ 507.1, 507.2 (discussing derivative works). Ms. Kashtanova has provided a narrative passage in her letter, *see* Kashtanova Letter at 3–4, but it is unclear whether the passage is an excerpt of the short story or the story in full. In any event, the story was not submitted as part of the deposit for the Work, so the Office does not need to address it in connection with this application.

⁷ Midjourney is a subscription service that allows users to pay to generate images, with subscription plans corresponding to the computational time it uses to generate images. *See Fast and Relax Mode*, MIDJOURNEY, <https://docs.midjourney.com/docs/fast-relax> (“Midjourney uses powerful Graphics Processing Units (GPUs) to interpret and process each prompt. When you purchase a subscription to Midjourney, you are purchasing time on these GPUs.”); *Subscription Plans*, MIDJOURNEY, <https://docs.midjourney.com/docs/plans> (providing information about different subscription plans). Unless stated otherwise, all websites were last visited on February 17, 2023.

⁸ “Ordinarily, the Office does not conduct investigations or make findings of fact to confirm the truth of any statement made in an application.” COMPENDIUM (THIRD) § 602.4(C). But the Office “may take administrative notice of facts or matters that are known by the Office or the general public,” and the Office may use that knowledge to evaluate an application that appears to be based on inaccurate or incomplete information. *Id.*

1. How Midjourney Works

Midjourney offers an artificial intelligence technology capable of generating images in response to text provided by a user. Midjourney operates on top of an unaffiliated third-party communication service called Discord, which is made up of individual servers operated by its users.⁹ In order to use Midjourney, users must first join the Midjourney Discord server, which contains public “channels” where users can enter text.¹⁰ Midjourney primarily operates through an automated account on these channels that reads user-entered text and generates images based on it. An example of a public channel depicting the use of Midjourney by individuals to generate images is provided below:



⁹ Discord is a communication service that allows users to create “servers” that contain individual “channels” for text or voice communication. See Librarian, *Beginner’s Guide to Discord*, DISCORD, <https://support.discord.com/hc/en-us/articles/360045138571-Beginner-s-Guide-to-Discord>.

¹⁰ See *Quick Start*, MIDJOURNEY, <https://docs.midjourney.com/docs/quick-start> (explaining that the first step for using Midjourney is to “go directly to the Midjourney Discord”).

Users operate Midjourney through “prompts,” which are text commands entered in one of Midjourney’s channels. As Midjourney explains, prompts must start with the text “/imagine” and contain text describing what Midjourney should generate.¹¹ Users also have the option to include (1) a URL of one or more images to influence the generated output, or (2) parameters directing Midjourney to generate an image in a particular aspect ratio or providing other functional directions.¹²

After a user provides Midjourney with a prompt, the technology will generate four images in response. The images are provided in a grid, and buttons underneath the grid allow users to request that Midjourney provide a higher-resolution version of an image (e.g., U1, U2, U3, U4), create new variations of an image (e.g., V1, V2, V3, V4), or to generate four new images from scratch (see light blue circular icon at far right below). For example, entering the prompt “/imagine cute baby dinosaur shakespere writing play purple” resulted in the following response from Midjourney:



It is relevant here that, by its own description, 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,” it instead converts words and phrases “into smaller pieces, called tokens, that can be compared to its training data and then used to generate an image.” *Prompts*, MIDJOURNEY, <https://docs.midjourney.com/docs/prompts>. Generation involves Midjourney starting with “a field of visual noise, like television static, [used] as a starting point to generate the initial image grids” and then using an algorithm to refine

¹¹ See *id.*; see also *Prompts*, MIDJOURNEY, <https://docs.midjourney.com/docs/prompts>.

¹² For a list of parameters, see *Parameter List*, MIDJOURNEY, <https://docs.midjourney.com/docs/parameter-list>.

that static into human-recognizable images. *Seeds*, MIDJOURNEY, <https://docs.midjourney.com/docs/seeds>.¹³

The process by which a Midjourney user obtains an ultimate satisfactory image through the tool is not the same as that of a human artist, writer, or photographer. As noted above, the initial prompt by a user generates four different images based on Midjourney’s training data. While additional prompts applied to one of these initial images can influence the subsequent images, the process is not controlled by the user because it is not possible to predict what Midjourney will create ahead of time. *See, e.g.*, Kashtanova Letter at 8 (describing the process of “provid[ing] the Midjourney service with [] prompts and inputs” so that it will “render[] another iteration” of the input “Raya as a hologram”).

2. *Application of Copyright Law to Midjourney Images*

Based on the record before it, the Office concludes that the images generated by Midjourney contained within the Work are not original works of authorship protected by copyright. *See* COMPENDIUM (THIRD) § 313.2 (explaining that “the Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author”). Though she claims to have “guided” the structure and content of each image, the process described in the Kashtanova Letter makes clear that it was Midjourney—not Kashtanova—that originated the “traditional elements of authorship” in the images.

Ms. Kashtanova claims that each image was created using “a similar creative process.” Kashtanova Letter at 5. Summarized here, this process consisted of a series of steps employing Midjourney. First, she entered a text prompt to Midjourney, which she describes as “the core creative input” for the image. *Id.* at 7–8 (providing example of first generated image in response to prompt “dark skin hands holding an old photograph --ar 16:9”).¹⁴ Next, “Kashtanova then picked one or more of these output images to further develop.” *Id.* at 8. She then “tweaked or changed the prompt as well as the other inputs provided to Midjourney” to generate new intermediate images, and ultimately the final image. *Id.* Ms. Kashtanova does not claim she created any visual material herself—she uses passive voice in describing the final image as “created, developed, refined, and relocated” and as containing elements from intermediate images “brought together into a cohesive whole.” *Id.* at 7. To obtain the final image, she describes a process of trial-and-error, in which she provided “hundreds or thousands of descriptive prompts” to Midjourney until the “hundreds of iterations [created] as perfect a rendition of her vision as possible.” *Id.* at 9–10.

¹³ While Midjourney starts with a randomly chosen number, called a “seed,” as the “starting point” for an image grid, users can use a parameter to specify a particular seed for the image-generation process. *See Seeds*, MIDJOURNEY, <https://docs.midjourney.com/docs/seeds>.

¹⁴ As described above, the text “--ar 16:9” is a “parameter,” or command, instructing Midjourney to generate an image in a 16:9 aspect ratio. *See Parameter List*, MIDJOURNEY, <https://docs.midjourney.com/docs/parameter-list> (adding “--aspect, or --ar” to a prompt instructs Midjourney to “[c]hange the aspect ratio of a generation”). *See also* Kashtanova Letter at 8 (“This input also contains a direction to the Midjourney service to constrain the output image to a 16:9 aspect ratio”).

Rather than a tool that Ms. Kashtanova controlled and guided to reach her desired image, Midjourney generates images in an unpredictable way. Accordingly, Midjourney users are not the “authors” for copyright purposes of the images the technology generates. As the Supreme Court has explained, the “author” of a copyrighted work is the one “who has actually formed the picture,” the one who acts as “the inventive or master mind.” *Burrow-Giles*, 111 U.S. at 61. A person who provides text prompts to Midjourney does not “actually form” the generated images and is not the “master mind” behind them. Instead, as explained above, Midjourney begins the image generation process with a field of visual “noise,” which is refined based on tokens created from user prompts that relate to Midjourney’s training database. The information in the prompt may “influence” generated image, but prompt text does not dictate a specific result. *See Prompts*, MIDJOURNEY, <https://docs.midjourney.com/docs/prompts> (explaining that short text prompts cause “each word [to have] a more powerful influence” and that images including in a prompt may “influence the style and content of the finished result”). Because of the significant distance between what a user may direct Midjourney to create and the visual material Midjourney actually produces, Midjourney users lack sufficient control over generated images to be treated as the “master mind” behind them.

The fact that Midjourney’s specific output cannot be predicted by users makes Midjourney different for copyright purposes than other tools used by artists. *See Kashtanova Letter* at 11 (arguing that the process of using Midjourney is similar to using other “computer-based tools” such as Adobe Photoshop). Like the photographer in *Burrow-Giles*, when artists use editing or other assistive tools, they select what visual material to modify, choose which tools to use and what changes to make, and take specific steps to control the final image such that it amounts to the artist’s “own original mental conception, to which [they] gave visible form.”¹⁵ *Burrow-Giles*, 111 U.S. at 60 (explaining that the photographer’s creative choices made the photograph “the product of [his] intellectual invention”). Users of Midjourney do not have comparable control over the initial image generated, or any final image. It is therefore understandable that users like Ms. Kashtanova may take “over a year from conception to creation” of images matching what the user had in mind because they may need to generate “hundreds of intermediate images.” *Kashtanova Letter* at 3, 9.

Nor does the Office agree that Ms. Kashtanova’s use of textual prompts permits copyright protection of resulting images because the images are the visual representation of “creative, human-authored prompts.”¹⁶ *Id.* at 10. Because Midjourney starts with randomly generated noise that evolves into a final image, there is no guarantee that a particular prompt will

¹⁵ For this reason, the cases cited by Ms. Kashtanova regarding Photoshop do not alter our conclusion. *See Kashtanova Letter* at 11 n.13. Both cases involved situations where the artist had made deliberate, intentional edits to an image using Photoshop. In *Etrailer Corp. v. Onyx Enters., Int’l Corp.*, the court credited the plaintiff’s statement that she used Photoshop to “smooth, crop, saturate, and burn” photographs of trailer accessories. Case No. 4:17-CV-01284-AGF, 2018 U.S. Dist. LEXIS 19916, at *4 (E.D. Mo. Feb. 7, 2018) (rejecting motion to dismiss that photographs were not protected by copyright). And in *Payton v. Defend, Inc.*, the court found a triable issue on copyrightability where the plaintiff used Photoshop to create a shirt design containing a silhouette of an AR-15 rifle based on a preexisting “picture of a model AR-15 Airsoft gun.” No. 15-00238 SOM/KSC, 2017 U.S. Dist. LEXIS 208358, at *9 (D. Haw. Dec. 19, 2017).

¹⁶ While Ms. Kashtanova suggests that her text prompts are copyrightable because they are similar to poems, she did not submit them in the application and is not seeking to register the text prompts themselves, either separately or as part of the Work. *See Kashtanova Letter* at 9–10. Accordingly, the Office has not addressed the question of copyrightability of prompts here.

generate any particular visual output. Instead, prompts function closer to suggestions than orders, similar to the situation of a client who hires an artist to create an image with general directions as to its contents. If Ms. Kashtanova had commissioned a visual artist to produce an image containing “a holographic elderly white woman named Raya,” where “[R]aya is having curly hair and she is inside a spaceship,” with directions that the image have a similar mood or style to a “Star Trek spaceship,” “a hologram,” an “octane render,” “unreal engine,” and be “cinematic” and “hyper detailed,” Ms. Kashtanova would not be the author of that image. *See id.* at 8 (text of prompt provided to Midjourney). Absent the legal requirements for the work to qualify as a work made for hire,¹⁷ the author would be the visual artist who received those instructions and determined how best to express them. And if Ms. Kashtanova were to enter those terms into an image search engine, she could not claim the images returned in response to her search were “authored” by her, no matter how similar they were to her artistic vision.

The Office does not question Ms. Kashtanova’s contention that she expended significant time and effort working with Midjourney. But that effort does not make her the “author” of Midjourney images under copyright law. Courts have rejected the argument that “sweat of the brow” can be a basis for copyright protection in otherwise unprotectable material.¹⁸ The Office “will not consider the amount of time, effort, or expense required to create the work” because they “have no bearing on whether a work possesses the minimum creative spark required by the Copyright Act and the Constitution.” COMPENDIUM (THIRD) § 310.7.

The Office’s determination here is based on the specific facts provided about Ms. Kashtanova’s use of Midjourney to create the Work’s images. It is possible that other AI offerings that can generate expressive material operate differently than Midjourney does. However, on the administrative record before the Office, Ms. Kashtanova is not the author for copyright purpose of the individual images generated by Midjourney.

3. *Images Edited by Ms. Kashtanova*

Finally, Ms. Kashtanova suggests that she personally edited some of the images created by Midjourney. Her letter points to two specific images contained in the Work. While the Office accepts the statement that the changes were made directly by Ms. Kashtanova, it cannot definitively conclude that the editing alterations are sufficiently creative to be entitled to copyright.

First, Ms. Kashtanova explains that she “modif[ied] the rendering of Zarya’s lips and mouth” in an image on page 2 of the Work. Kashtanova Letter at 12.

¹⁷ *See* 17 U.S.C. § 101 (definition of “work made for hire”).

¹⁸ Copyright protection cannot serve “a reward for the hard work that went into” creating an otherwise unprotectable work, because otherwise “sweat of the brow” would permit copyright to extend further than the author’s original contributions. *Feist*, 499 U.S. at 352–53.

Detail before Photoshop



Detail after Photoshop



The changes to Zarya’s mouth, particularly her upper lip, are too minor and imperceptible to supply the necessary creativity for copyright protection. The Office will register works that contain otherwise unprotectable material that has been edited, modified, or otherwise revised by a human author, but only if the new work contains a “sufficient amount of original authorship” to itself qualify for copyright protection. COMPENDIUM (THIRD) § 313.6(D). Ms. Kashtanova’s changes to this image fall short of this standard. *Contra Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 34–35 (2d Cir. 1982) (revised drawing of Paddington Bear qualified as a derivative work based on the changed proportions of the character’s hat, the elimination of individualized fingers and toes, and the overall smoothing of lines that gave the drawing a “different, cleaner ‘look’”).

Second, Ms. Kashtanova points to an image on page 12 of the Work depicting an old woman with her eyes closed. She describes this work as created “using both the Midjourney service and Photoshop together,” with edits in Photoshop made to “show[] aging of the face, smoothing of gradients[,] and modifications of lines and shapes.” Kashtanova Letter at 11. The image as it appears in the Work is displayed below:



Based on Ms. Kashtanova's description, the Office cannot determine what expression in the image was contributed through her use of Photoshop as opposed to generated by Midjourney. She suggests that Photoshop was used to modify an intermediate image by Midjourney to "show[] aging of the face," but it is unclear whether she manually edited the youthful face in a previous intermediate image, created a composite image using a previously generated image of an older woman, or did something else. To the extent that Ms. Kashtanova made substantive edits to an intermediate image generated by Midjourney, those edits could provide human authorship and would not be excluded from the new registration certificate.

IV. CONCLUSION

For the reasons explained above, the Office concludes that the registration certificate for *Zarya of the Dawn*, number VAU001480196 was issued based on inaccurate and incomplete information. Had the Office known the information now provided by Ms. Kashtanova, it would have narrowed the claim to exclude material generated by artificial intelligence technology. In light of the new information, the Office will cancel the previous registration pursuant to 37 C.F.R. § 201.7(c)(4) and replace it with a new registration covering the original authorship that Ms. Kashtanova contributed to this work, namely, the "text" and the "selection, coordination, and arrangement of text created by the author and artwork generated by artificial intelligence." Because these contributions predominantly contain textual material, they will be reregistered as an unpublished literary work.¹⁹ The new registration will explicitly exclude "artwork generated by artificial intelligence."

The public record will reflect this decision. First, the record for the cancelled registration will indicate that the cancellation was due to a failure to exclude non-human authorship contained in the work. Second, the record will reflect that a new, more limited registration for this work has been issued in Class TXu and will include a cross-reference to that new registration. Third, the new registration will include a cross-reference to the cancelled registration in the "Prior Registration Cancelled" field. Finally, the Office will add the following annotation to the new certificate: "Reason for Reregistration: VAU001480196 cancelled pursuant to 37 CFR 201.7(c)(4) for failure to exclude non-human authorship." The new registration will have the same effective date as the cancelled registration: September 15, 2022.

The Office will cancel the original certificate of registration and issue a new certificate reflecting these changes and mail it to Ms. Kashtanova under separate cover.

Sincerely,



Robert J. Kasunic
Associate Register of Copyrights and
Director of the Office of Registration Policy & Practice

¹⁹ To be clear, this reclassification is made solely for purposes of registration. It "has no significance with respect to the subject matter of copyright or the exclusive rights" in this work. 17 U.S.C. 408(c)(1).