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PERSPECTIVE

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Warhol, Prince and the future of copyright

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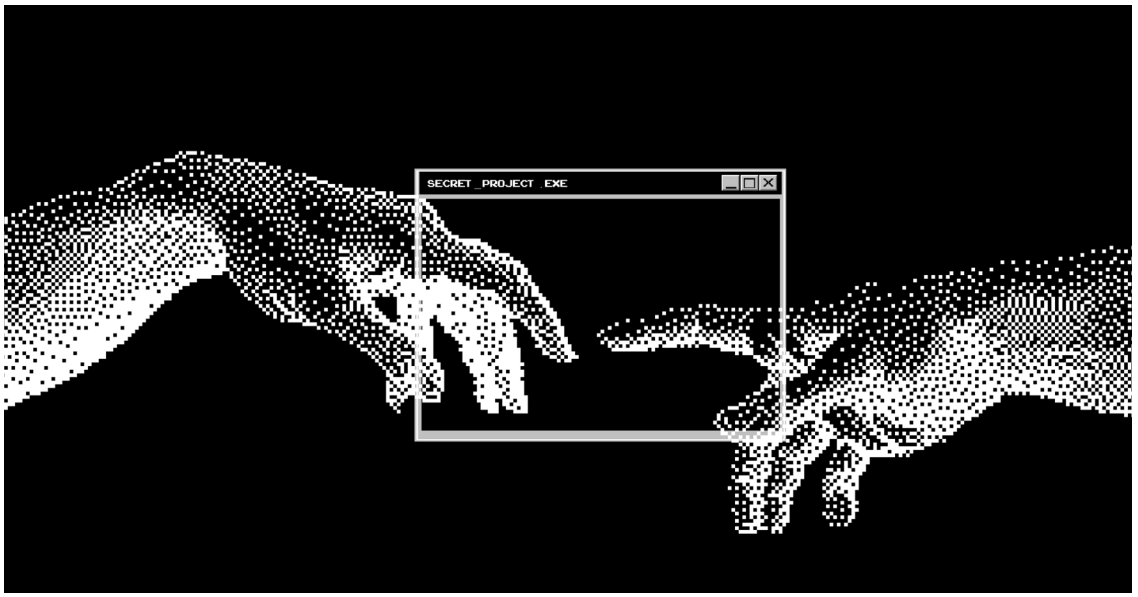

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Even back in simpler times, copyright scholars debated whether human expression was necessary for copyright protection. In 2018, the Ninth Circuit Court of Appeals seemingly answered the question by denying copyright protection for a photographic "selfie" taken by Naruto, a Celebres crested macaques. In *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018), the Ninth Circuit held that animals lack statutory standing to sue under the Copyright Act. If my cat, Zelda, steps in paint and in a burst of feline energy creates an inspired work of pawprints, I (and she) cannot stop someone - a literal "copycat" - from selling copies of Zelda's pawprint art.

The Court in Naruto observed that the Copyright Act refers to an author's "children," "widow," grandchildren," and "widower," terms which "all imply humanity and necessarily exclude animals." The Ninth Circuit didn't just single out the animal kingdom for its exclusion from copyright protection. Previously, in *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955, 957-59 (9th Cir. 1997), the Ninth Circuit noted that words "'authored' by non-human spiritual beings" are protectable only if there is "human selection and arrangement of the revelations." According to the Ninth Circuit, non-human "authors" were simply out of luck.

With the necessity for human expression answered, the nature and scope of the expression required for copyright protectability has posed more difficult questions. These questions arise in determining whether an author's work is sufficiently original to merit copyright protection, and in evaluating whether a work is so "transformative" that it is considered a non-infringing "fair use" even where it directly borrows from another author's underlying work.

On Oct. 12, 2022, the U.S. Supreme Court will consider the human expression and transformation needed in determining fair use when it hears oral argument in the highly-watched case of *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2nd Cir. 2021), review granted (March 28, 2022). In 1981, a well-known celebrity photographer, Lynn Goldsmith, photographed musical artist Prince, then a rising star, by posing him against a white background and applying purple eyeshadow and lip gloss. Vanity Fair licensed Goldsmith's photograph and commissioned legendary pop artist Andy Warhol to produce an illustration of Prince to be used in connection with the magazine's article about Prince. Warhol later created a series of 16 colorful silkscreen prints based on the Goldsmith photograph. After Conde Nast republished its Vanity Fair article in a commemorative edition after Prince's death with one of Warhol's colorful illustrations on the cover, Goldsmith threatened to sue for copyright infringement and the Warhol Foundation brought a preemptive action for declaratory relief.

The trial court concluded that Warhol did not infringe Goldsmith's copyright because his work was

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sufficiently "transformative" to constitute fair use. According to the lower court, Warhol had injected enough of his own creativity by changing Goldsmith's depiction of Prince as a vulnerable young man into an "iconic, larger-than-life figure." The Second Circuit Court of Appeals disagreed, finding that Warhol's images retained the essential elements of the photograph (including Prince's gaze and facial features) without significantly altering or adding to them. Without a "fundamentally different artistic purpose and character," the Second Circuit concluded, Warhol's work was not sufficiently "transformative" to avoid liability based on fair use. Other courts have wrestled with this same question, coming to varying standards of when an author has imbued a new work with a different meaning, purpose, or character than the original. In short, courts have had trouble deciding what creative contribution is worthy of its own protection as opposed to the mere, and unlawful, appropriation of another author's work.

Because of this uncertainty, and the Second Circuit's split with Ninth Circuit justices who have more consistently found a new work to be transformative and fair-use protected, the U.S. Supreme Court will soon tackle this issue and hopefully provide needed guidance to the lower courts.

Even if the Supreme Court does provide some clarity on this issue, there are even more difficult questions lurking in the background. After all, the Warhol Foundation case involves whether one human being's expression is sufficiently transformative of another's expressive work. But what happens when a machine or computer algorithm creates the new work? In this emerging world of the metaverse, augmented reality, and AI-generated content, it is not difficult to see that more and more content - artistic and otherwise - will be generated solely by machines rather than human beings. The result will be legal issues even more perplexing than those involving humans making colorful silkscreens, let alone selfie-taking monkeys or paw-painting cats.

To be sure, copyright law has long protected human-generated content that could only be made with the aid of machines. Copyrighted works such as software, photographs and certain types of artwork all require the use of sophisticated equipment and tools. Computers and digital technology make the creation and dissemination of these works easier and faster. Still, a human element is required. Human beings compose the lighting, background and subject matter of their photographs, and design the software that computers process. Human cognition and creativity is involved in every copyrightable work.

But that is about to change. AI-generated expression is not the product of a human mind instructing or operating a machine. Although a human being may have initiated the computer programming, it will be the machine itself that decides what to create and where it will be disseminated. Computers will make new artwork, some of which may even qualify as "transformative" under the Supreme Court's upcoming Warhol Foundation decision, while some may not. If this artwork would be protectable if it had a human creator, who owns the copyright if no human being had a part in making it? Is copyright protection even possible?

Likewise, who is legally responsible if a machine copies a human's protectable expression? Can an AI content-generating computer be liable for infringement? Do humans who "own" these machines become vicariously liable for what their machine does on its own? If Zelda's paw-print painting is not capable of copyright protection, I wouldn't expect to be sued for infringement as her owner if she knocked off a human-created paw painting.

On Feb. 14, 2022, the Review Board of the U.S. Copyright Office denied a second request for reconsideration regarding a refusal to register artwork created by AI. Importantly, the application for copyright registration indicated that the artwork was created "autonomously" by "a computer algorithm running on a machine." The applicant did not assert that the work was created with any contribution from a human author. The Copyright Office's decision does not address whether, and to what extent, human involvement in the creation of machine-generated works will allow for copyright protection. The U.S. courts, and most likely Congress, will need to address this issue in the not-so-distant future. The scope of protection for AI-generated content is complex and beyond the scope of this article. But the debate has started.

U.K. law provides for copyright protection of fully AI-generated works with a specific category for works created "in circumstances such that there is no human author of the work," defining the author as the "person" who has made the arrangements necessary for its creation. This law does not address how works created by AI or machine-learning will satisfy the underlying copyright requirement of originality, which is typically measured by human elements of skill, labor and judgment. The UK Intellectual Property Office sought advice on this subject but has not yet published the results. Other jurisdictions are also considering whether AI works should be protected and, if so, whether they should qualify for protection under existing copyright laws or under a different scheme altogether.

As new technology develops, it seems that the requirement of human expression, whether in creating an original work or transforming an existing work, is evolving - just as human beings themselves are evolving. According to Yuval Noah Harrari, author of the best-selling book *Sapiens*, and other experts, the very survival of homo sapiens as a species is threatened by our gradual merging into the computers and technology that we once controlled. Many pundits predict that, one day, we will become similar to cyborgs, indistinguishable from our own technology, with AI having won out over human intellect and emotion. For those whose cell phones and smart watches have literally become stuck to them, maybe that process has already begun.

In today's world, at least, copyright law protects expression and creativity, the very essence of what it means to be human. In this upcoming term, the U.S. Supreme Court will decide the extent to which we protect an individual's contributions to another's creative expression. The Court will apply these principles to human expression but there will be even more difficult, and important, questions to follow.