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| RESEARCH ARTICLE

Human Authorship in AI-Assisted Creative Works: A Three-Factor Test for Evaluating Expressive Control

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| ABSTRACT

The increasing use of generative Artificial Intelligence in creative production has complicated the determination of human authorship under copyright law. While the United States Copyright Office permits the registration of works containing AI-generated material, the Office currently relies primarily on case-by-case adjudication for such applications, which lacks clear evaluative criteria for determining whether human involvement is sufficient for authorship. This paper argues that a functional test for adjudication is necessary to guide authorship determination. Building on established copyright law and precedents, this paper proposes a functional three-factor test for evaluating human authorship. The proposed test examines expressive control across three stages of creative production: intellectual conception, the generative process, and post-generation modification. By assessing human control over the expressive elements of a work at each stage of creative production, the test provides a structured approach for determining whether the final expressive form of the work can reasonably be attributed to human creative judgment and thereby establish sufficient grounds for human authorship. The proposed framework offers clarity and consistency for copyright adjudication, by providing guidance for better adapting the existing copyright law to the increasing integration of AI technologies in creative production.

| KEYWORDS

Copyright Law, Generative Artificial Intelligence, Human Authorship, Expressive Control

| ARTICLE INFORMATION

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1. Introduction

Generative Artificial Intelligence (AI) has rapidly expanded the production of creative works across multiple fields and has generated significant economic value [1]. Recent studies estimate that generative AI has the potential to contribute between $2.6 and $4.4 trillion annually to the global economy, in which media and creative industries are among the most affected sectors [2]. With the AI-incorporated creative production becoming increasingly widespread, there is growing attention to questions about the ownership and copyright protection of works containing AI-generated content [3].

While U.S. copyright law recognizes corporations as authors in certain contexts under the "work for hire" doctrine, at the doctrinal level, authorship continues to be anchored in human intellectual conception, making the establishment of human authorship the first and most crucial step of registering AI-incorporated works [4]. The United States Copyright Office (USCO) issued guidance in 2023 regarding the registration of AI-generated works [5]. The current approach in the guidance relies primarily on case-by-case adjudication without articulating clear evaluative criteria for determining human authorship [5]. The failure to develop definite standards for adjudication may results decline in predictability and comprehensibility of the decision. [6] This paper argues that the central determinant that establishes authorship is the allocation of expressive control and proposes a functional test for evaluating the degree of human involvement in creative works containing AI-generated materials and the sufficiency for human authorship.

Section 2 below will first examine the doctrinal foundations of authorship and analyze the key principles in authorship allocation. Section 3 will analyze the challenges that generative AI poses to traditional authorship adjudication, and different approaches the scholars propose, and establish the necessity for clarification of the authorship adjudication standards. Finally, the paper proposes a functional test for evaluating and allocating expressive control in AI-assisted works between the machine and human creators, which leads to the determination of sufficiency for human authorship adjudication.

2. The Statutory and Doctrinal Foundations of Authorship

U.S. copyright law establishes three core principles in authorship adjudication: originality, intellectual conception, and that human centrality principle. U.S. Copyright Act of 1976 (Title 17), though it does not explicitly define authorship, establishes the baseline for copyright protection through the requirements of originality, fixation, and idea-expression distinction [7]. In Feist Publication, Inc. v Rural Tel Service Co. case, the Supreme Court held that originality requires independent creation and at least some minimal degree of creativity, thereby limiting copyright protection to works that reflect creative judgments [8–10]. In Burrow-Giles Lithographic Co. v. Sarony, it is established that intellectual conception is the pillar for originality [11]. It established that authorship shall be attributed to the person who exercises intellectual conception and creative control over the expressive elements of the work.[10,11]. In Naruto v. Slater, the Ninth Circuit held that non-human entities cannot qualify as authors under Title 17 [12]. Taken together, these authorities demonstrate that copyright law attributes authorship to a human creator whose intellectual conception and creative decisions determine the expressive form of the work.

The central mechanism through which these principles operate is the concept of control over expressive elements (expressive control). Judicial precedents distinguish conception and execution in the creative process, emphasizing the leading role of intellectual conception and creative control over execution [13]. In Burrow-Giles v. Sarony, the court granted Sarony authorship because Sarony's "mental conception" of the image dictated the execution of the image [11,13]. Similarly, in Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, the court attributed authorship to the film director because the director had extensively planned and controlled how each shot should be executed [14]. Therefore, it is established that expressive control of the work is the key determinant in authorship adjudication, whereas delegation of execution to tools or employees is allowed judicially [13].

Expressive control is not only a conception of the work but also a dictate over how the work is produced [13]. Title 17 draws a distinction between idea and expression, explicitly excluding mere idea and methods of operation from copyright protection [7]. In cases involving the delegation of labor, when extensive control over the execution of the expressive elements is absent on the side of the delegator, the executor of the work will be attributed authorship. For example, in Nottage v. Jackson, the court attributed the authorship to the photographer instead of the firm that hired him for the task, stating the person who "superintended the arrangement" of the photo should be the author [15]. Similarly, in Geshwind v. Garrick, the court attributed authorship to the animator for a project instead of the producer, on the basis that the producer's instructions had too little influence on the animator's execution [16]. Therefore, expressive control is better understood as control over the steps that lead to the manifestation of the work's key expressive elements.

3. Challenges in Determining Human Authorship in AI-Assisted Works

The authorship adjudication standards further the human-centrality principle under the copyright law. The USCO released a copyright law guidance in 2023 affirming the possibility of registering work containing AI-generated materials while upholding the three core principles, that the work to be registrable for copyright protection must be authored by a human and pass the standards for intellectual conception and originality [5]. Notably, it extensively emphasizes that AI must function only as an "assisting instrument" of the work, and the work must "owe its origin to a human being", reaffirmed by the decisions in Thaler v. Perlmutter [5,17]. Therefore, the key step to copyrighting the work containing AI-generated materials is to prove that expressive element of the work originates from human intellectual conception. The guidance provides examples of cases, which are uniformly judged based on whether humans exercise expressive control over the work and throughout the process of production [5]. Allocation of expressive control seems to be the central determinant of human authorship, thereby determining the copyrightability of a work containing AI-generated materials.

Some scholars have attempted to preserve human authorship by analogizing AI to "ordinary tools" that rely on the creative contribution of their users. Historically, U.S. copyright law has found no major difficulties in recognizing new technologies, from cameras to computer programs, as tools and granted copyright protection to works involving them [3,10,13,18]. Scholars attempted to argue that AI, however complicated and advanced it may seem, is another technological tool that assists its end-users in performing tasks according to instructions [18]. Therefore, the incorporation of AI should not render obstacles in establishing human authorship.

However, AI draws a distinction from ordinary tools for its unpredictability in how the output would be automated due to its ability to make creative decisions without human input [10,13]. The USCO guidance specifically highlights the randomness and unpredictability of AI automation as a serious impediment to copyright eligibility, [5] because such characteristics of AI outputs may introduce a degree of autonomy in the generation of expressive elements, thereby weakening the human expressive control that lies at the core of authorship adjudication [13]. In addition, due to the opaqueness of the AI algorithm and database, the black box problem, the users cannot predict or explain the outputs [19], which can render difficulties in accurately assessing expressive control. Taken together, the random and opaque nature of AI generations distinguishes AI from the ordinary tools under the copyright law.

Currently, the USCO provides general guidance with principles and illustrative examples regarding the copyrightability of work containing AI-generated materials, but it ultimately relies on case-by-case adjudication without articulating clear criteria for determining human authorship [5]. Some commentators, who responded to the Notice of Inquiry published by the USCO, expressed concerns about the lack of clarity in case-by-case adjudication of AI-incorporated works, stating that it may discourage the production of AI-incorporated creative works and create uncertainty among authors in ownership of their works [20–22]. While the USCO recognizes its desire for clarity, it denies the necessity for further specification [3].

However, despite such concerns, sole reliance on case-by-case adjudication creates significant practical and enforcement difficulties. First, the absence of clear evaluative criteria may lead to inconsistent and inefficient adjudication, risking raising concerns regarding due process, fairness, and transparency in adjudication.[6] Determining authorship in AI-assisted work requires a detailed examination of the creative process [3]. Without structured and transparent standards, similar cases or cases with similar merits may be decided inconsistently. Second, given the rapid growth of the AI creative market, the anticipated increase in volume of applications may pressure the USCO's adjudicative capacity. According to a USCO online webinar, as of 2023, there were fewer than 100 claims of work known to incorporate generative AI content [23]. By January 2025, USCO reported hundreds of registered AI-incorporated works [3]. The growth of the market and the volume of claims may exhaust the Office and overwhelm the process, risking ramifications including extended processing time, increasing administrative burden, and enforcement malpractice. These concerns suggest that the current case-by-case approach does not sufficiently resolve the central legal challenges for human authorship adjudication in AI-assisted work. Accordingly, a functional and measurable threshold test is needed to evaluate the allocation of expressive control and thereby determine authorship.

4. A Functional Test for Evaluating Expressive Control

To address the issue, this paper proposes a functional test for evaluating the allocation of expressive control between human creators and generative AI systems. The preceding analysis demonstrates that expressive control is the central determinant of human authorship [13]. The proposed test operationalizes this principle by evaluating human expressive control with three factors across judicially important stages of creative production: intellectual conception, control over the generative process, and post-generation modification [3].

As established by the relevant guidance and precedents, the allocation of expressive control requires first identifying the expressive elements of the work [5]. Because expressive elements vary across practices, they must be identified with reference to genre and principal components of the work [5]. This paper does not attempt to provide an exhaustive classification of expressive elements across different creative domains. The following section adopts a generalized approach and focuses only on how expressive control over these elements may be allocated between the human creator and AI.

4.1. Doctrinal Justification for the Three-Factor Test

The preceding analysis has established that authorship under U.S. copyright law is governed by a set of interrelated doctrinal principles, among which the key determinants of authorship are originality, intellectual conception, and the requirement that authors be human [13]. While these doctrinal principles define the requirements of authorship, they do not themselves provide clear standards for evaluating how authorship should be attributed in complex cases. In AI-assisted creative production, control over expressive elements is distributed across production stages and between human actors and AI [3,5]. To ensure the consistency and transparency of authorship determination, the current jurisprudence requires a more structured test for authorship adjudication in copyright registration.

The use of a factor test composed with standards and a series of meaningful inquiries is more appropriate than rigid rules for authorship adjudication for AI-assisted production. As legal theory has long recognized, rules provide certainty by reducing legal determinations to formally realizable criteria, but risk generating systematic over- and underinclusion when applied to factually complex situations [24]. As authorship determination depends on evaluating multiple dimensions of creative contribution across different stages of production, [3] no single criterion for a fixed threshold can capture the volatility of this subject matter. Therefore, a rule-based approach is ill-suited to the inquiry of authorship determination. For this reason, a factor-based framework with a

certain extent of generality provides a more faithful means of implementing the underlying legal principles [24]. Copyright law has also long relied on factor-based tests where the underlying inquiry cannot be reduced to rules. For example, the fair use doctrine, codified in 17 U.S. Code § 107, employs a four-factor test to guide the court in weighing the fair use of copyrighted work [25]. The fair use doctrine emphasizes that the inquiry must consider the totality of circumstances. The proposed three-factor test adopts this same methodology to guide human authorship adjudication through fact-specific inquiry.

The proposed three-factor test assesses the attribution of expressive elements across stages of production. The three factors expand from USCO's analysis of the three kinds of human contribution to AI-generated outputs—"prompts", "expressive inputs", and "modifications or arrangements of AI-generated outputs" and integrate them with doctrinal principles for authorship [3,5]. The first factor, intellectual conception, evaluates human control over the creativity and conception of the work, determining whether the work meets the principle of originality and creativity, as established in Burrow-Giles and reinforced by the originality requirement in Feist [8,11]. The second factor, control over the generative process, evaluates human involvement and contribution throughout the execution of the work, corresponding to the court's emphasis on exacting control over the execution of intellectual conception in authorship establishment [16]. It is also designed to address USCO's concerns regarding the unpredictability and randomness of AI automation by assessing the degree of predictability of the output to further guide the evaluation of the degree of human control of the outputs [3,5]. The third factor, post-generation modification, aligns with the originality doctrine. It particularly follows the recognition of selection and arrangement in determining originality, as established in Feist [8]. It also assesses the meaningfulness of the alteration, aiming to limit non-trivial alterations from originality of creativity under the standard established in Batlin v. Snyder. Each of the three factors represents a dimension of expressive control [26]. And, collectively, they reflect a unified doctrinal inquiry consistent with the copyright law and coherent with the USCO guidance.

Overall, the three-factor test established based on recognized doctrinal principles and operationalizes existing principles in the context of AI-assisted creative production. The test does not expand the definition of authorship beyond its established legal limits. Instead, it preserves the core legal principles of authorship and key judicial considerations under the copyright law by inquiring into facts that guide the determination of whether the final expressive form of the work can be reasonably attributed to human creative judgment. By making explicit the legal principles underlying authorship determination, the proposed test provides a more coherent and consistent method for adjudicating authorship in AI-assisted works than the current case-by-case approach.

4.2. A Three-Factor Test: Evaluating Human Expressive Control in AI-assisted Works

The Three-Factor Test operates as a factor test that provides a structured framework for evaluating whether human expressive control is sufficient for authorship adjudication. Copyright adjudicators should evaluate the principal factors rather than applying a rigid rule [24]. The paper proposes a novel framework that consists of three principal factors in evaluating expressive control, reflecting the meaningful stages of production: control over intellectual conception, generative process, and post-generation modification [3,13].

Under each main factor, adjudicators should identify the relevant expressive elements of the work and evaluate the allocation of control over those elements between the human creator and AI. The analysis should classify the control over each expressive element as human-controlled, AI-controlled, or indeterminate. These elements should then be evaluated together in light of the ultimate inquiry of whether human expressive control predominates in the work. The test does not mechanically count the elements. Instead, the elements should be weighted collectively to determine whether the work's expressive form can reasonably be attributed to human creative judgment.

4.2.1. Factor One: Expressive Control over the Intellectual Conception

Factor One evaluates expressive control at the stage of intellectual conception, which often occurs before the generation of expressive material begins. The primary subject of review at this stage is the prompt or other instructions and inputs provided by the human creator. The adjudicator should examine the following four inquiries of expressive elements in the prompt in consideration of expressive control. First, *whether the human creator specifies the principal conceptual elements of the work, including its theme, purpose, key message, genre or general creative directions. This inquiry examines the control over the general intellectual conception based on the conceptual elements of creative works, especially in initial prompting* [27]. *Second, the adjudicator should inquire whether the human creator defines specific expressive features of the work, such as stylistic direction, composition, narrative structure, or other genre-specific expressive elements. Inquiry (2) further examines the intellectual conception of the expressive elements specific to the genre and creative nature of the work* [5]. *Third, the adjudicator can further examine the work by inquring whether the human creator provides inputs or instructions that meaningfully guide the generation of the material. This inquiry aims to evaluate the detailedness of human inputs and prompting, as of which may affect the level of sufficiency for the authorship claim, because the more detailed and instructive the human input is the more it may eliminates the randomness and unpredictibitliy of the output automated by the AI* [3]. *Complementary to inquiry (3), the adjudicator can inquire about whether the*

inputs supplied by the human creator originate from the human creator's own creative contribution or are generated by another AI generated work or referenced to published works of other authors. The forth inquiry serves to determine whether inputs originated by the human creator's intellectual conception.

The four inquiries operate cumulatively. Each inquiry builds upon the others, reflecting a progressively greater degree of specificity and expressive control of the human creator. However, no one inquiry could independently and arbitrarily determine whether or not the human creator possess expressive control over intellectual conception of the work. The facts collected by these inquiries should be evaluated together to determine whether the inputs of the human creator is sufficient to establish expressive control over the intellectual conception of the work at this stage. For example, strong expressive control over factor one, intellectual conception, is indicated where the prompt defines both the conceptual framework and key expressive features of the work. Conversely, prompts that merely provide abstract ideas or satisfy only the first inquiry suggest weak or insufficient control at this stage.

4.2.2. Factor Two: Expressive Control over the Generative Process

Factor Two evaluates expressive control during the generative stage, when AI produces expressive material. At this stage, the primary subject of review is the interaction between the human creator and the AI system throughout the generation process, aiming to determine who exercises control over which and how expressive elements are produced. The adjudicator should consider the following five inquiries in consideration of expressive control. First, the adjudicator should inquire whether the human creator formulates prompts or instructions that direct the generation of expressive elements. And second, they should consider whether the human creator iteratively refines prompts or instructions in response to generated outputs that result in distinguishable alternation from the previous version. The first and second inquiries evaluate whether the human creator respond to the generaeted outputs and iteratively modifies the generation by providing instructions to make perceivable refinement. They help evaluate the human creator's involvement in the execution of the work, which, as demonstrated in the judicial precedents, is important factor in adjudicating expressive control [15,16]. Complementarily, third, the adjudicator can further inquire that whether the human creator specifies the iterative prompts or instructions, concerning the primary expressive elements of the work. This inquiry further examines the meaningfulness of the refinement following the preceding inquiries, determining whether the control is exercised over the expressive elements of the work. Secequently, they can inquire about whether the human creator imposes constraints on the generative process with respect to relative expressive elements of the work, and whether the human creator selectively accepts, rejects, or compile generated outputs during the generation process. These two inquiries independently reflects distinct method of creative judgement, which, as recognized by the court in Feist, constitute originality in intellectual conception [8].

The inquiries function as independent indicators of expressive control during the generative process. The presence of multiple indicators generally reflects a stronger degree of human control over the generation of expressive material. While satisfaction of either one of the inquiry cannot independently guarantee establishment of expressive control of Factor Two, the absence of any indication under these inquiries should be generally considered insufficient control over the generative process, which, in consideration of the precedents, absence of control over the execution of the work may constitute insufficiency in authorship establishment [15,16]. To determine the expressive control of Factor Two, the adjudicator should evaluate facts presented by the inquiries altogether and according to the relative importance of each inquiry in light of the nature of the work.

4.2.3. Factor Three: Expressive Control over Post-Generation Modification

Factor Three evaluates expressive control at the post-generation stage, whether the human creator exercises any independent creative contributions to the work. This factor focuses on any post-generation modification, selection, editing, and other human creative contributions. This factor can occur during the generative process and after the final generation of AI. While satisfiing this factor is not mandetaory in establishing human authorship, presence of independent contribution from the human creator in the work post-generation often indicate greater claim for human authorship and eligibility for copyright protection for at least some part of the work [3]. The following seven inquiries should be considered in evaluating expressive control. The first inquiry is whether the human creator selects among generated outputs. And secondly, whether the human creator rearranges expressive elements or integrates multiple generated outputs into a final composition. The first and second inquiries examine editorial decision and creative judgement of the human creator, including selection made throughout the generative process. As established in Feist, selection, arrangement and compilation of the work reflects original creative judgement of the creator, which is also recognized by the USCO as protectable work [3,8]. Progressively, the inquiry three and four should ask whether the human creator modifies or edits the final generated material, and whether the modification or editing is executed by the human creator with any non-generative tools. These two inquiries subsequently evaluates the human inputs at the post-generational stage, examining whether the human creator contributed technically and conceptually to the final version of the work. According to the example case presented in the USCO report, works that undergone edits, adaption and modifications by the human creator can be sufficient for

finding human authorship for the edits and modification contributed by the human creator [3]. Complementary to the previous inquiries, the fifth inquiry should ask whether the human creator combines AI-generated material with independently created human expression. This inquiry aims to help determine whether the modificiaton is, in fact, owes its origin to the independent creative judgement of the human creator. Finally, to determine the meaningfulness of the modification, inquiry six asks whether the modification, refinements, or editing done by the human creator concern meaningful expressive elements of the work, and inquiry seven should evaluate whether the modifications, refinements or editing done by the human creator meaningfully alter, improve, or affect the expressive elements of the work. The last two inquiries examine the perceivability of the modification, in determining whether the modification is sufficient for establishing originality under L. Batlin & Son, Inc. v. Snyder [26].

Inquiries (1) through (5) function as individual indicators of expressive control, while inquiries (6) and (7) operate as a general baseline for evaluating whether the human creator exercises meaningful control over the modifications. The presence of one or more indicators under Factor Three generally reflects stronger human control over the final expressive form of the work. At the same time, as discussed earlier in the paper, the absence of post-generation modification does not necessarily preclude the finding of human authorship. However, trivial or mechanical alterations can be viewed as insufficient to establish expressive control in modification. As established by L. Batlin & Son, Inc. v. Snyder, minor alterations that are "not perceptible to the casual observers" do not constitute originality, and thereby are not sufficient to establish expressive control [11,26]. Therefore, inquiries (6) and (7) should serve as a baseline while evaluating the remaining inquiries under Factor Three.

5. Conclusion

The increasing integration of generative AI into creative production has complicated the determination of human authorship under the copyright law and its adjudication process. The current case-by-case adjudication approach creates uncertainty for creators and increases administrative burden and risks. This paper has argued that authorship in AI-incorporated creative works should be evaluated through a functional factor test centered on its key determinant, expressive control.

The paper proposed a three-factor test, with evaluative inquiries under each, which translates established copyright principles into structured criteria for authorship adjudication. The test assesses human control over the relevant expressive elements of a work across three judicially meaningful stages of the creative production—intellectual conception, the generative process, and post-generation modification. The test helps clarify the evaluative standards of sufficiency for human expressive control adjudication and thereby human authorship adjudication.

As generative technologies continue to evolve and infiltrate different aspects of modern society, one of the central challenges for copyright law is how it can meaningfully adapt and respond to technological development. A structured evaluative approach offers one path toward resolving that challenge.

Future research will refine the proposed framework through systematic application and comparative analysis. Specifically, the next stage of this project will involve applying the three-factor test to a curated set of AI-assisted works across different industries and technological contexts, and comparing the resulting authorship determinations with decisions published by the United States Copyright Office. This analysis will evaluate the framework's consistency, robustness, and explanatory capacity, and may further inform potential refinements to the weighting and interaction of the factors across different modes of creative production.

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