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# U.S. AI and Copyright Protection Updates - A New Dawn for Copyright in AI-Generated Works?
# 美国 AI 与版权保护动态 - 人工智能生成作品的版权保护是否迎来新的曙光

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On February 21, 2023, the Copyright Office eclipsed its prior decisions in the area of AI authorship when it partially cancelled Kristina Kashtanova's registration for a comic book titled ***Zarya of the Dawn***. In doing so, the Office found that the AI program Kashtanova used—Midjourney—was primarily responsible for the visual output that the Office chose to exclude from Kashtanova's registration. (Midjourney is an AI program that creates images from textual descriptions, much like OpenAI's DALL-E.) The decision not only highlights tension between the human authorship requirements of copyright law and the means of expression that authors can use, but it also raises the question: Can AI-generated works ever be protected under U.S. copyright law?

2023 年 2 月 21 日，美国版权局决定部分撤销了克里斯蒂娜·卡什塔诺娃（Kristina Kashtanova）对一本名为《黎明的查莉娅》（Zarya of the Dawn）的漫画书的版权登记，使其在人工智能领域有关作者版权的以往决定都黯然失色。根据该项取消决定，美国版权局认定，卡什塔诺娃所使用的人工智能程序 Midjourney 是美国版权局决定将作品的视觉输出结果排除在卡什塔诺娃登记版权权利之外的主要原因。（注：Midjourney 是一种根据文本描述创建图像的人工智能程序，与 OpenAI 的 DALL-E 十分类似）。美国版权局的这一决定不仅凸显了美国版权法对人类作者身份的要求和作者可以使用的表达方式的热点关注，且提出了一个问题：即人工智能生成的作品究竟能否受到美国版权法的保护？

**The Decision**
撤销版权登记的决定背景

On September 15, 2022, the U.S. Copyright Office issued a registration for Kashtanova's comic book, *Zarya of the Dawn*, which consists of text written by Kashtanova and images created using Midjourney. Thereafter, the Office learned of Kashtanova's public statements that she used an AI program to create *Zarya of the Dawn*, initiated cancellation of the registration, and provided Kashtanova with an opportunity to show cause why the registration should not be canceled. In response, Kashtanova argued that she used Midjourney the way a photographer uses a camera, or the way a graphic designer uses Adobe Photoshop, and that her "core creative input"—i.e., text "prompts" and "previously developed" images—as well as her "iterative process" of selecting Midjourney images led to her creation of *Zarya of the Dawn*.

2022 年 9 月 15 日，美国版权局为卡什塔诺娃的漫画书《黎明的查莉娅》（Zarya of the Dawn）进行了版权登记。这本漫画书是由卡什塔诺娃撰写的文本和其使用 Midjourney 而生成的插画组成。此后，美国版权局获悉了卡什塔诺娃使用人工智能程序生成《黎明的查莉娅》插画的公开声明，故引发了美国版权局撤销该版权登记的决定。美国版权局向卡什塔诺娃提供了一次机会以阐明其版权登记不应被撤销的理由。在对美国版权局版权登记撤销决定的回应中卡什塔诺娃辩称，她使用 Midjourney 就如同摄影师使用相机，或图形设计师使用 Adobe Photoshop 软件一样，她的"核心创造性输入"，即文本"提示"和"预设"的图像，以及她挑选 Midjourney 图像的"迭代过程"使她创作出了《黎明的查莉娅》的插画。

While the Office found that Kashtanova's selection and arrangement of text and images within the *Zarya of the Dawn* comic book was protectable, it found that Kashtanova did not author the actual images within the comic book because Midjourney generates images in an "unpredictable way," such that Kashtanova did not "actually form" those images. The Office based its conclusion on "the significant distance between what a user may direct Midjourney to create and the visual material Midjourney actually produces" finding that "Midjourney users lack sufficient control over generated images to be treated as the 'master mind' behind them." The Office also rejected Kashtanova's argument that she authored the images through her "creative, human-authored prompts" because Midjourney prompts are mere "suggestions" not "orders."

然而，美国版权局认为，尽管卡什塔诺娃在《黎明的查莉娅》漫画书中对文本和图像的选择和安排可以受到保护，但卡什塔诺娃并不是漫画书中插图的实际作者，因为 Midjourney 是以一种"不可预测结果的方式"生成插画图像的。因此，版权局认为卡什塔诺娃并不是"实际创设"了这些图像。美国版权局的结论是基于"用户可能指示 Midjourney 创建的内容和 Midjourney 实际生成的视觉材料之间的巨大差异"，其发现"Midjourney 用户对 Midjourney 所生成的图像缺乏足够的控制力，从而人类用户无法被视为 Midjourney 及其所生成图像背后的'智囊团'"。美国版权局还驳回了卡什塔诺娃关于她是通过"创造性的、人类创作的提示"而创作了这些插画图像的说法，因为美国版权局认为向 Midjourney 输入的提示仅仅是"建议"而并非"命令"。

**Analysis**
分析

While consistent with the human authorship requirement reflected in previous Office and judicial decisions, this decision raises several important questions.
这一撤销版权登记的决定虽然与先前美国版权局和司法决定中所反映的对人类作者身份要求保持一致，但却提出了几个重要问题。

First, if copyright authorship is defeated by mere use of "unpredictable" tools, how does that impact experimentation in art? To create artworks—many of which are generally understood to be at the "core" of copyright protection—artists routinely take risks and experiment with different tools, mediums and modes of creation, all of which is, by definition, unpredictable. How many of the most important works of art would be denied protection if they were evaluated based on

whether the means of expression used were predictable? If we follow the Office's reasoning to its logical conclusion, would it lead to untenable results?

首先，如果仅仅由于使用"不可预测结果"的工具就否定了版权作者身份，这会对艺术体验产生怎样的影响？为了创作艺术作品（其中许多作品被普遍理解为是受版权保护的"核心"），艺术家们通常会冒险尝试不同的创作工具、媒介和方式，而所有这些工具、媒介和方式从严格定义上讲都是"不可预测结果的"。如果根据所使用的表达方式是否可预测结果来评估，有多少最重要的艺术作品将会失去版权保护？如果我们按照美国版权局的推理逻辑进行总结，会不会导致偏驳的结论？

Second, although the Office reached the same conclusion as to all Midjourney images, reasoning that Midjourney users lack creative control, can users exercise a greater degree of control over Midjourney images? For example, Kashtanova generated some images with text prompts, and others with "previously developed" images. Did Kashtanova exert *more* creative control when she provided visual content for Midjourney to mimic? And could some users' text prompts be detailed and nuanced enough to cross the line from "suggestion" to "order"?

其次，尽管美国版权局针对所有 Midjourney 所生成的图像作出了相同的结论，认为 Midjourney 用户对生成结果缺乏创造性的控制，但用户是否可以对 Midjourney 的图像生成实施更大程度的控制？比如，卡什塔诺娃曾向 Midjourney 进行文本提示而生成了一些插画，而她也通过"预设"的图像使用而使 Midjourney 生成了其它一些插画。当卡什塔诺娃向 Midjourney 提供视觉内容提示而供 Midjourney 模仿时，她是否对 Midjourney 实施了更大程度的创造性的控制？另外，当某些用户向 Midjourney 作出的文本提示足够详细和微妙时，其文本提示是否跨越了从"建议"到"命令"的界限？

Third, how much creative control is enough to support authorship under U.S. copyright law, and to what extent does the requisite creative control vary with the means of creative expression used? Whereas the Office is accustomed to finding photographs protectable, and thus unlikely to question whether a photograph was taken with creative control over lighting, angle, timing, etc., its decision on *Zarya of the Dawn* suggests that AI-generated works will receive heightened scrutiny. Such scrutiny may be unwarranted; for example, one could argue that Kashtanova exercised the same degree of control over Midjourney that a film director exercises on set, where there can often be improvisation by the actors and actresses. Assuming that Kashtanova made significant contributions to the images in *Zarya of the Dawn*, is she any less deserving of joint authorship than a film director? See *Garcia v. Google, Inc*., 766 F.3d 929, 933 (9th Cir. 2014), on reh'g en banc, 786 F.3d 733 (9th Cir. 2015) (discussing joint authorship in the context of a film.)

第三，根据美国版权法，有多少创造性的控制足以支持人类作者身份，而作者所使用的创造性表达手段在多大程度上影响并左右作者对作品的创造性控制的程度？美国版权局习惯性地认为摄影作品是可版权保护的，因此不太可能质疑摄影作品是否是在对光线、角度、时机等进行创造性控制的情况下拍摄的。然而，美国版权局撤销《黎明的查莉娅》的版权登记的决定表明，人工智能所生成的作品将受到版权局更严格的审查。这样的审查有可能是毫无根据的；例如，人们可以辩说，卡什塔诺娃对 Midjourney 的控制程度与电影导演对拍摄片场的控制程度是相同的，因为在电影拍摄片场，演员们也常常可以进行即兴表演。假设卡什塔诺娃对《黎明的查莉娅》中的插图做出了可观的贡献，那么她是否可以由此获

得与电影导演一样受保护的合作作者身份？（参见 *Garcia 诉谷歌公司案*，案卷号 766 F.3d 929，第 933 页（美国联邦第九巡回上诉法院，2014 年），全案重审，案卷号 786 F.3d 733（美国联邦第九巡回上诉法院，2015 年）（该案件讨论了电影背景下的合作作者身份问题））。

**A New Dawn for Copyright in AI-Generated Works?**
**人工智能生成作品的版权是否会迎来新的曙光？**

While the Office's decision on *Zarya of the Dawn* may not bode well for copyright protection over AI-generated works, it may also be an outlier. Kashtanova's statement of sole authorship was inconsistent with her public statements about Midjourney, and her use of "Zendaya" in text prompts suggests that Zarya was more celebrity copy than original creation. Further still, the Office limited its decision to Midjourney, noting that "[i]t is possible that other AI offerings that can generate expressive material operate differently than Midjourney does."
虽然美国版权局对《黎明的查莉娅》的版权登记撤销决定对于人工智能生成作品的版权保护问题可能不是一个乐观的先例，但它也可能只是一个特例情况。卡什塔诺娃有关其为作品的独家作者身份声明与她对使用 Midjourney 的公开声明不一致，而她在文本提示中使用的"Zendaya"表明 Zarya 与其说是原创，倒不如说是对名人的仿制品。更进一步，美国版权局将其撤销版权登记的决定仅限于针对 Midjourney，并指出"其他可以生成表现材料的人工智能产品与 Midjourney 的运作方式可能是不同的。"

Clearly, then, the broader question of copyrightability of AI-generated content remains open. Creators, developers, and content platforms should pay careful attention as these issues continue to percolate through the Office and the federal courts, and the copyright issues around AI-generated works further develop and are hopefully clarified.
因此很显然，更广泛的人工智能生成的内容的版权保护问题函待解决。创作者、开发者和内容平台应当密切关注这些问题。美国版权局和联邦法院也会持续关注和筛查这些问题。围绕人工智能生成作品的版权保护问题也将会有新的进展并有望得到进一步澄清。