

WHERE AUTHORSHIP BEGINS

On origin, presence, and the question of what caused an image

BY MAREEN FISCHINGER · PHOTOGRAPHER, SYNTHOGRAPHER, BOARD MEMBER BFF

Mareen Fischinger works as a photographer and synthographer and serves on the board of the German professional association BFF. Ahead of the autumn symposium of the Institute for Copyright and Media Law on 6 November 2026, where she will speak on a panel about what creatives expect from a reformed copyright law, this essay takes up two fundamental questions: where does the material come from that images are made of – and what makes someone an author?

Fischinger argues deliberately from a double perspective. She defends the particular character of photographic authorship while working with image-generative processes herself. It is precisely out of this tension that she develops her critique of how we currently handle training material, copyright, labelling and synthetic images – and her attempt to redefine authorship not by the tool used, but by origin, presence and responsibility.

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THE APPLE

An apple hangs on a tree, someone photographs it. The image is banal. It has no composition worth defending and no idea that goes beyond the apple.

It is protected nonetheless. German copyright law distinguishes between the photographic work, which requires a personal intellectual creation, and the simple photograph. Protection therefore does not necessarily depend on whether an image can count as art. What matters first is the act of taking the picture.

Not: is this art? But: was someone there?

The apple was already hanging. The photographer did not put it there, did not plant the tree, did not set the light and did not choose the season. She invented nothing. She was there. And in the moment she releases the shutter, something comes into being that she holds rights to.¹

Which brings us straight to the two questions: where does the material come from? And what makes someone an author?

THE CAR PARK

In 2009 I photographed a woman scratching the paint of a car in an underground garage. A man in a suit approaches. In that moment she notices she is being seen.

None of it happened.

The car stayed intact, the two did not know each other, the situation was invented, planned and lit on location over several hours. It was part of my diploma thesis on staged photography. Back then I called it the creation of a fictional reality.²

It is a photograph all the same. Not because its story is true, but because two people were in that underground garage that evening and light from them fell onto a sensor.

At the time I divided photography into three categories: depiction of reality, transformation of reality, and creation of a reality. Seventeen years later a fourth has been added, one I had not counted on: artificial generation without reality.

Photography never proves the narrative. It proves the presence.

WHAT TOOK PLACE

A sign can refer to something by convention – the word apple has nothing apple-like about it. It can refer by resemblance – a drawing looks like an apple. And it can refer by causation: the smell of a freshly cut apple is an indication that one is probably lying nearby.

Semiotics calls the latter the index.³

Photography combines resemblance and causation. It looks like the thing, and the thing caused the image. Roland Barthes put it more simply: the essence of photography lies in the fact that what is depicted has been. Not beautiful, not true, not significant – but having been.⁴

An image generated with AI can resemble, but it is not caused in the same way. It can look like a scene that never existed.

This is clearest with analogue film. Light alters the carrier. Silver grains react, the negative is an object that light actually touched. In digital form this becomes a measurement: a sensor registers photons and produces a file. Technically the difference is considerable, but the principle stays the same.

Something was there. And something came back from it.

With an artificially generated image, nothing comes back. It is computed.

In between lies almost everything we now see in contemporary image production. And that is exactly where the debate works worst, because it is usually conducted as an either/or.

It is often said that photography has survived other technological upheavals before. That is true – and it still misses today's shift. From the daguerreotype to film, from film to the digital sensor, from the darkroom to Photoshop, what changed again and again was **how** an image came into being. What never changed was the precondition that something had to be present.

Anyone who wanted to photograph a chair needed a chair.

For the first time, that constant is up for negotiation. Comparing this to the shift from analogue to digital is comparing a change of tool with the disappearance of the workpiece.

TWO QUESTIONS

I work with cameras, analogue and digital, and I work with image-generative processes. Out of that double practice, I do not think a new definition of photography is needed to begin with.

Two questions are enough:

How much of this image came into being through light?

And where does the rest come from?

A conventionally processed photograph: everything came into being through light, nothing was added.

A more heavily retouched photograph: almost everything came into being through light. What has been added are interventions that alter the existing material.

A real exposure with generated image areas: one part comes from light, another from a model.

A generation based on one's own photographic material: the final image did not come about directly through light, but its origin can at least partly be named.

A pure text-to-image generation: nothing in the final image comes directly from a concrete photographic process, and the origin of the underlying visual material remains largely invisible.

This is not a ranking. For now it is only a description.

In concrete terms that means: I do not work exclusively with text prompts. The starting point of my generated images are my own photographs – people, places, light, clothing, spaces or textures. At the beginning of my synthetic images there are therefore often images whose origin I know.

NO CLEAN PRIMORDIAL SOUP

Of course a photographer also draws on material she did not create. Faces, architecture, fashion, props, weather, pictorial traditions. The apple was already hanging. Someone else built the chair.

You could picture our visual culture as a soup that has been simmering for a very long time. At the very bottom lies material that no longer belongs to anyone. Above that lie layers to which rights attach. And above those again, material that entered digital systems without its creators being asked.

The decisive difference is not **that** something is drawn from, but **how the reservoir came about**.

Nobody assembled the real world specifically so that I could photograph it. It is simply there. The data foundations of image-generating models, by contrast, were built deliberately out of gigantic quantities of existing data. To do that, images had to be captured, processed and in part copied. This is precisely where the copyright dispute begins.

That also makes my own work with these tools uncomfortable. I work on a technical foundation whose creation I neither controlled nor legitimised. Courts are now dealing with the question of the conditions under which copyright-protected material may be used to build AI training datasets. The Regional Court and the Higher Regional Court of Hamburg held such use permissible in the case at hand, on the basis of the statutory text and data mining exceptions; the appeal is pending before the Federal Court of Justice. A final clarification is therefore still outstanding.⁵

At the same time, commercial providers of AI systems now compete with the very people whose work may have contributed to their development.

Anyone who refuses such tools entirely risks losing touch with new modes of production. Anyone who uses them works

on a foundation whose origins they cannot fully survey.

Neither of these positions is entirely clean.

The only question is whether you know what you are drawing on – and whether you admit what you know.

THE AUTHOR AS COLLECTOR

In 1934 Walter Benjamin asked not how an author stands towards the relations of production, but how he stands **within them**. The image of the solitary genius interested him little. The author could be a collector, an assembler and a compiler.⁶

That connects remarkably well to today's debate. Something is missing nonetheless.

For Benjamin, the producer was meant to change the apparatus rather than merely supply it. Transferred to generative AI systems, that would mean: anyone who only enters text and selects is above all using the existing apparatus. Anyone who brings in their own visual worlds, their own data, their own decisions and their own curation at least changes the conditions under which their images are produced.

A structural problem remains, though: millions have contributed material as the basis of these systems, but few own the machines.

That is a remarkable shift in authorship and control.

THE PROOF IS NOT THE WORK

Case law, too, is still wrestling with where human authorship begins in generative processes.

In the United States, the U.S. Copyright Office in 2025 recognised copyright protection for a digital artwork created with AI support – for the human selection, coordination and arrangement of the AI-generated components, but not for the AI-generated image elements themselves.⁷ The first application had been refused; what convinced the office was a video of the creation process.

In China, a court affirmed protection for an image generated with Stable Diffusion in 2023. Numerous prompts, negative prompts, parameter settings and repeated adjustments were enough there to establish a sufficient human contribution; the AI was classified as a tool of the human.⁸

Other courts have denied protection to generatively produced images. The Prague Municipal Court decided as much in 2023 for a photorealistic-looking graphic generated with

DALL-E from a simple text prompt: no creative activity by a natural person.⁹

The decisions contradict each other less than it first appears. What matters is how far the human being creatively determines the specific output.

The Higher Regional Court of Düsseldorf refined the standard in April 2026. The ruling first states what is protected in a photograph at all: not the motif, but perspective, framing, and the gradation of light and focus. The pictorial idea is therefore free, its execution is not. For the generated image the inverse applies: whoever leaves the design decision to open-ended instructions creates no work of their own. The burden of proof lies with whoever invokes their copyright.¹⁰

It becomes problematic when one's own creative involvement in an AI-supported work is hard to prove after the fact. Does an artist have to document her entire working process in order to be able to demonstrate later what creative share she herself had in the result?

MY PROCESS

I work image-conditioned and multimodally. My own photographs feed into my results: props, clothing, locations, landscapes, light and people I have worked with.

Sometimes it is a garment, sometimes an environment, sometimes only a texture or the way light falls through a room.

With real people I work with so-called digital twins only on the basis of corresponding agreements. There are contracts, remuneration and, above all, the consent of the person depicted regarding what their likeness is used for.

The technical processing likewise takes place in an environment where my inputs do not automatically become new training material. The necessary copyright licences and personality-rights consents – in particular for the use of the material in connection with AI systems – are explicitly obtained and contractually regulated. A model release from a time before generative processes does not, in my view, automatically cover this.

I do not control the base model. The process built on top of it, however, I largely do.

My photographs are not a crutch for a model that cannot do enough. I use them because I have a concrete idea of what should appear in the image.

It gets particularly sensitive with recognisable real people in generated situations. The viewer recognises a person who exists and can infer from that an event that never took place.

The release protects the person depicted. Only labelling protects against the false impression created in the viewer.

And on the question of proof: I do not film my working process. My source images exist. There are RAW files, metadata, releases and commission records.

Authorship does not have to be filmed. It has to be reconstructible.

WHO BENEFITS FROM INDISTINGUISHABILITY

The evidentiary force of a photograph is not a property of the individual image. It rests on a cultural agreement.

We cannot see in a photograph that something took place. We assume it, because we have learned that an image which looks photographic usually refers to something that existed in front of a camera.

Once enough images look photographic without going back to such a process, that assumption collapses.

The damage then hits more than deepfakes. It hits the real photographs. Their credibility falls, although nothing about them has changed at all.

And after that comes the more dangerous effect: anyone caught out in a genuine photograph can claim, "that's AI."

The mere technical possibility of forgery is enough to sow doubt. In research this is described as the *liar's dividend*.¹¹

The only person who profits from complete indistinguishability is the one with something to hide.

There is a further problem on top of this: synthetic images flow back into the datasets of future systems. Models increasingly learn from the outputs of other models.¹² Visible labels can be cropped off, metadata is lost on upload, invisible markers do not always survive processing steps.

This creates a shared dependency: creatives need distinguishability so that the origin and value of their work remain recognisable. Developers of image-generating systems need it so that their own data foundations do not increasingly consist of synthetic material.

WHAT I AM CALLING FOR

First, differentiation instead of a blanket yes or no to AI images. The questions "how much came into being through light?" and "where does the rest come from?" are not a finished system. But they force us to name origin again at all.

Second, machine-readable labelling has to become robust. The European AI Act provides for transparency obligations for certain synthetically generated content. What will be decisive is whether the technical label survives real production and publication routes. A marker that is lost on the first upload does not serve its purpose.

Third, alongside the labelling of synthetic content we also need **positive proof of origin for photographs**. Systems such as C2PA, or Content Credentials, can secure information cryptographically at the moment of capture.¹³

They do not certify that what is shown is "true". My staged scene in the car park would not have become true through them either.

But they can certify that there was an exposure.

That goes surprisingly far.

I call for such labelling not despite my own work with generated images, but precisely because of it.

WHERE AUTHORSHIP BEGINS

Authorship begins where something else would have been possible.

For me that involves two things: presence and decision.

Presence creates a space of possibilities. Whoever is in a place sees everything the image could have contained.

Authorship then shows itself in what is discarded. A photographer recognises, prioritises, shifts and leaves out. Anyone who has worked on a set knows that presence is itself work. You read a room, you notice when someone tenses up, you react to something unforeseen – and sometimes that is exactly where the image comes from.

This is not an accessory to photography. It is part of its procedure.

A generative model does not possess this presence. It has been nowhere. It cannot wish for something to stay out of the frame. It produces the probable from what is available to it.

The apple was already hanging. The image still only came about because someone was there and made a decision.

Tools change.

Responsibility remains.

And photography stays relevant wherever that responsibility remains visible, traceable and nameable.

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This text is a personal essay. It reflects the author's view as a photographer and synthographer and does not represent an adopted position of any association.

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NOTES

1. Section 2(1) no. 5 and Section 72 UrhG (German Copyright Act); on the threshold of protection see inter alia CJEU, C-145/10 (Painer), 1 December 2011; BGH, I ZR 143/12 (Geburtsstagszug), 13 November 2013.
2. Mareen Fischinger: *Inszenierte Fotografie*. Diploma thesis, Communication Design, Fachhochschule Düsseldorf, 2009.
3. Charles S. Peirce on the distinction between symbol, icon and index; on photography see inter alia Rosalind Krauss: *Notes on the Index*, 1977; Philippe Dubois: *L'acte photographique*, 1983.
4. Roland Barthes: *Camera Lucida. Reflections on Photography*, 1980/1981.
5. LG Hamburg, 310 O 227/23, 27 September 2024; OLG Hamburg, 5 U 104/24, 10 December 2025; appeal before the BGH on 3 September 2026.
6. Walter Benjamin: *The Author as Producer*, 1934.
7. U.S. Copyright Office, Copyright Registration, A Single Piece of American Cheese (Kent Keirse), 30 January 2025, Reg. No. VAu001543942.
8. Beijing Internet Court, Li v. Liu, judgment of 27 November 2023, case no. (2023) Jing 0491 Min Chu No. 11279.
9. Městský soud v Praze (Prague Municipal Court), judgment of 11 October 2023 – 10 C 13/2023-16.
10. OLG Düsseldorf, decision of 2 April 2026 – I-20 W 2/26.
11. On the so-called *liar's dividend*: Robert Chesney/Danielle Citron, 2019.
12. On model collapse see inter alia Shumailov et al., *Nature*, 2024.
13. Content Credentials under the C2PA standard.