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Copyright Office Publishes Report on Copyrightability of AI-Generated Materials

The United States Copyright Office (USCO) has released its report on the copyrightability of outputs generated by artificial intelligence (AI) systems (the Report). This is the second of three reports the USCO plans to release on the intersection of copyright and artificial intelligence. The first report, issued in July 2024, addressed digital replicas.¹ A third and final report, which will address the legal implications of training AI models on copyrighted works, licensing considerations and the allocation of any potential liability, is expected later this year. These reports all emanate from a Notice of Inquiry (NOI) on copyright and AI that the USCO issued in August 2023.

Overall, the Report — issued on January 29, 2025 — reiterates the USCO’s fundamental positions on the copyrightability of works generated through the use of AI:

- Human authorship is a bedrock of copyrightability, and thus works entirely generated by AI are not copyrightable.
- The mere selection of prompts, even if those prompts are detailed and are the product of some human effort, does not itself yield a copyrightable work, although this determination could change as technology evolves.
- Where a work includes both human and AI-generated content, only the human contributions are potentially copyrightable.
- The use of AI as a tool to enhance the human creative process (*e.g.*, for ideation or to edit an image) does not render the entire work uncopyrightable.

Background

In March 2023, the USCO issued [guidance on works containing material generated by AI](#), confirming its position that human authorship is required to register a work, and that if a work contains more than a de minimis amount of AI-generated material, the applicant must disclose that information and provide a brief statement describing the human author’s contribution.² Following that 2023 guidance, the USCO solicited public comments on the legal and policy issues related to AI and copyright, through an NOI. The USCO received more than 10,000 comments, which informed the analysis and recommendations in the current Report.

Overview

The Report begins by acknowledging the historical adaptability of copyright law to new technologies, ranging from photography to computer programs, and that copyright law has evolved to protect various forms of creative expression. The Report notes that while significant attention has been focused on AI-related registrations that have been rejected

¹ See our Aug. 7, 2024, client alert “[Copyright Office Advocates for Federal ‘Digital Replica’ Law.](#)”

² See our Aug. 2, 2023, client alert “[Copyright Office Provides Guidance on the Registration of Works That Include AI-Generated Material.](#)”

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by the USCO, registrations for hundreds of works incorporating some form of AI-generated material have been granted since the 2023 guidance was issued.

Authorship and Artificial Intelligence

The Report focuses on the legal framework governing authorship, highlighting the necessity of human creativity in the creative process for copyrightability. The Report presents four main categories of potential human contributions to AI-generated works: use of AI to facilitate the human creative process; use of prompts to generate outputs; use of “expressive inputs”; and human modifications or arrangements of AI-generated content.

Use of AI To Facilitate the Human Creative Process

The Report clarifies that merely using AI to enhance the creative process (*e.g.*, scrubbing an image to remove unwanted elements) does not necessarily limit copyright protection, nor does using AI to generate ideas that a human then takes to create original, particularized expression.

Use of Prompts

The Report reiterates the USCO position that a user’s entering of prompts into an AI model alone, even if those prompts are highly detailed, does not provide sufficient human control over the resulting AI-generated expression and work to render the user an author of that work. The Report notes that “prompts may reflect a user’s mental conception or idea, but they do not control the way that idea is expressed.” In this regard, the Report analogizes the use of AI prompts to the analysis conducted when determining whether a party contributed sufficient expression to a joint work to be considered an author. Specifically, the Report states that just as a person who solely describes to an author what a commissioned work should look like is not a joint author, someone entering a prompt into an AI model specifying what the output should look like cannot be considered an author of the AI-generated output.

The Report rejects the theory that using multiple, refined prompts to generate a desired output is sufficient to claim copyright protection in the resulting output, noting that such theory amounts to a “sweat of the brow” argument that does not bear on the key consideration of originality. Further, according to the Report, even with multiple prompts, each output is the AI system’s interpretation of the instructions provided, and not human expression.

The Report acknowledges that certain AI systems allow users to set a “seed” value that facilitates the generation of more consistent outputs as different prompts are used. The Report concludes that although this process allows the user to partially control the

images that are generated, this is insufficient for authorship purposes since there is no guarantee of perfect consistency.

The Report also acknowledges that AI may advance in a manner that would allow humans to exercise more control over AI-generated outputs through the use of prompts such that the issue of copyrightability would need to be revisited. However, the Report cautions that technology may also advance in a way that further minimizes the human expressive element.

Use of ‘Expressive Inputs’

The Report addresses cases where an author inputs a creative work into an AI system and then directs that system to modify the creative work — for example, an author that inputs a hand-drawn image into an AI system and directs that AI system to embellish the image in certain ways (*e.g.*, to make it photorealistic). The Report concludes that if the human-generated work is perceptible in the AI-generated output, the human can claim authorship of, and copyright in, the perceptible portion of the work in the output, similar to the way an author of a derivative work can own a copyright in the specific material they added. Importantly, the Report distinguishes the use of prompts that merely communicate desired outcomes (*e.g.*, instructions to generate a new image) from expressive inputs that may limit the range of objectively foreseeable potential outputs. The position that the human-expressive elements of an output are protectible is consistent with the decision of the USCO Review Board to reject the copyright application in [Sahni \(December 2023\)](#). In that matter, the applicant had taken his own photograph and used an AI tool apply a filter of Van Gogh’s *Starry Night*. The Review Board concluded that the final image was not copyrightable because Sahni’s human authorship (his original photograph) could not be distinguished or separated from the final work produced by the AI tool.³

Modifying or Arranging AI-Generated Content

The Report reiterates the views set forth in the 2023 guidance that a human can select or arrange AI-generated material in a sufficiently creative way such that “the resulting work as a whole constitutes an original work of authorship,” or can modify AI-generated works to such a degree that the modifications meet the standard for copyright protection. The Report cites, as an example, AI tools that allow a user to control the selection and placement of individual creative elements (*e.g.*, AI tools that permit musicians and sound engineers to modify recordings or tools that enable film editors to edit film). Whether such human activity meets the minimum standard of originality required under copyright law will require a case-by-case determination.

³ See our Dec. 14, 2023, client alert “[Copyright Office Rejects Application for AI-Generated Work Based on a Photograph.](#)”

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Additional Laws Not Required

A number of commenters to the NOI advocated for a *sui generis* law to protect AI-generated works, arguing that such protection would incentivize the creation of more works, benefiting the public. However, the view held by the majority of the NOI commenters, and the one supported by the USCO, is that existing laws are adequate, and providing additional protection for AI-generated content could undermine human creativity and flood the market with low-quality works, ultimately harming the creative economy.

International Perspective

The Report also includes a comparative analysis of the copyrightability of AI-generated works in various other jurisdictions, and concludes that countries that have addressed this issue “so far have agreed that copyright requires human authorship.”

Takeaway Points

The Report does not modify the positions the USCO has taken to date regarding the copyrightability of AI-generated works.⁴ Creators that use prompts to generate content without using any additional expressive inputs will need to remain mindful that the output generated will likely not be copyrightable, meaning it can be freely copied by others. Creators who use AI to add to or modify an image, who aggregate or arrange AI images, or who use expressive inputs as part of the creative process need to keep in mind that only the human-authored elements may be protectable. Whether such contributions are sufficiently original or creative to warrant copyright protection will remain a case-by-case determination.

⁴ See our Sept. 14, 2023, client alert “[Copyright Office Rejects Application for Refusal To Disclaim AI Generated Elements](#)”; our Dec. 14, 2023, client alert “[Copyright Office Rejects Application for AI-Generated Work Based on Photograph](#)”; and our March 16, 2023, client alert “[Copyright Office Issues Guidance on AI-Generated Works, Stressing Human Authorship Requirement](#).”