

Client Alert: Copyright Registration for Works Containing AI-Generated Material

Publications

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The rapid rise in availability, use and performance of generative artificial intelligence (“AI”) over the last year is being experienced across industries. Responding to these trends, the US Copyright Office recently published policy guidance on copyright protection and registration of works created using generative AI.^[1] Overall, the guidance emphasizes the centrality of human creativity to copyright protection and reflects skepticism that material generated by current AI technologies is entitled to copyright protection. To allow for the Office’s examination of works containing AI-generated material, the Office provided instructions for disclosing and disclaiming such material when seeking to register works. Copyright owners will be well served to pay attention to this guidance, summarized below, when registering works, and to consider supplementing any prior registrations for works containing AI-generated material.

Background

Generative AI refers to artificial intelligence systems that use technologies such as large language models, which are “trained” by processing preexisting content and metadata and which can then be used to produce new content in response to user prompts. Although limited systems capable of generating material in response to natural language prompts have been around since the 1960s,^[2] the technology has recently burst into public awareness due to the availability and widespread use of new systems with simple user interfaces capable of creating high-quality outputs in various media, including computer programs, poetry and prose, images, music, videos, and other material.

Creators are using generative AI to supplement, edit, inspire, or even replace their own works of all types. At one end of the spectrum, an AI output may be generated with limited human control and be intended to stand on its own. For example, Stephen Thaler used an AI system to create a visual image, “A Recent Entrance to Paradise.” His copyright registration listed the AI as the author, and he stated that the system had “autonomously” created the work. The Copyright Office rejected that application based on its longstanding practice of denying registrations to non-human authors.^[3] That decision is currently being reviewed in a case pending in the federal District Court for the District of Columbia.^[4]

At the other end of the spectrum, creators may have complex interactions with an AI system to realize a creative vision and then modify, reimagine or incorporate the result into a larger work. For example, Kristina Kashtanova used a text-to-image AI system to create illustrations for a comic book. Rather than merely typing one or two prompts to get an image, Kashtanova went through “‘hundreds or thousands of descriptive prompts’ . . . until the ‘hundreds of iterations created as perfect a rendition of her vision as possible.’”^[5] Still, the Office recently cancelled her registration for the book as a whole and issued a new registration covering only the text and the compilation of images in the work.^[6]

A wide variety of other uses that combine human and machine authorship are possible and occurring. Potential use cases include using AI to generate:

- a still image used as all or part of the cover art for a human-created work;
- a software module included in a larger program created by human programmers;
- still images used in an audiovisual work otherwise artistically designed and produced by humans;
- sounds that a human mixes with a recording of human musicians; and
- a story reworked by a human author.

In each case, the creation of a work in whole or in part using AI raises questions about whether and to what extent the work is protected by copyright. No US judicial decision has addressed those questions. However, courts have held that copyright does not protect works created by a monkey,^[7] nature,^[8] and alleged celestial beings.^[9] Works incorporating substantial human authorship are presumably protected by copyright to some extent, although it remains to be seen where courts will ultimately draw the line on how much influence or control a human needs to have over an AI technology’s output to give rise to copyright ownership over that output.

The Office’s Guidance

While we wait for judicial guidance, creators will need to seek copyright registrations from the Office, and the Office will need to process registration applications for works consisting in whole or part of AI-generated material.

The Office’s recent guidance is consistent with its registration decisions noted above. The Office reemphasized its position that copyright protects only material that is the product of human creativity. “If a work’s traditional elements of authorship were produced by a machine, the work lacks human authorship and the Office will not register it.”^[10] More specifically, when AI technology determines the “expressive elements” of the output, such as the words, rhyming pattern, and

structure of a poem, the Office will not register it.^[11] In general, the guidance reflects skepticism that any material generated by current AI technologies is entitled to copyright protection.

To allow the Office to examine claims of copyright in works containing such material, the guidance requires applicants to disclose on their registration applications “the inclusion of AI-generated content in a work submitted for registration and to provide a brief explanation of the human author’s contributions to the work.”^[12] The Office also explained that anyone who may have previously obtained a registration for a work containing AI-generated material, or who has a pending application for a work containing AI-generated material, should assess whether the application disclosed that material, and if not, correct the record based on the Office’s new guidance. Otherwise, the Office suggested the registration may be ineffective.

The Office’s position concerning copyright protection, and the need for disclosure on registration applications, are factors that copyright owners should consider when developing their AI governance policies. While many factors may play into a decision whether or not to use AI tools or to include AI-generated material in a work targeted for commercialization or other public dissemination (including quality and the risk that the created work is itself infringing), the possibility that use of AI-generated material could diminish or eliminate copyright protection and become an issue in a future enforcement action deserves consideration.

Registration of Works Containing AI-Generated Material

Copyright registration provides copyright owners important potential benefits (*e.g.*, the right to file an infringement action and, in some circumstances, the right to seek statutory damages and attorneys’ fees). To secure these advantages, it is particularly important that copyright registrants pay attention to the Office’s guidance when registering works containing AI-generated material and consider supplementing any prior registrations or pending applications for such works. Failure to follow the Office’s guidance risks examination delays and denials of registration. And as noted in the guidance, failure to disclose AI-generated material as the Office now requires could make a registration ineffective.

Below we describe the specific procedures specified by the Office in its guidance.

New Applications

1. Use the Standard Application.

Approximately 98% of registration applications are now submitted through the Office’s online registration system eCO. When using eCO to register a work containing AI-generated material, applicants are instructed to select the “Standard Application” option. It appears that the form options for “Single Application”—works by individual authors which are subject to a lower registration fee—and for “Group Registration” are *not* available for such works.

2. Identify Human Authors.

The authors identified on the application should be human beings, or in the case of works made for hire, employers of human beings, who contributed original authorship to the work. Neither the AI technology used to create the work nor the provider of that technology should be identified as an author.

3. Describe Human Authorship on the “Author Created” Page.

After entering the name of an individual or corporate author, an applicant using eCO is prompted to enter information about the author’s contribution to the work. The applicant should select the boxes that describe the author’s contributions to the work (*e.g.*, text, artwork) and, if necessary, provide more detail about the human authorship in the “Other” field. For example, if a human incorporated AI-generated text into a larger textual work, the Other field could be used to claim the portions of the textual work that are human-authored. The primary place for distinguishing machine authorship from human authorship, however, is the “Limitation of the Claim” page as explained below.

4. Disclaim AI-Generated Material on the “Limitation of the Claim” Page.

The Office’s guidance instructs that AI-generated material that is more than *de minimis* should be excluded from the copyright claim. This is to be done on the “Limitation of Claim” page in eCO in essentially the same way that preexisting material is excluded when registering a derivative work. Under “Material Excluded,” the applicant should select the types of elements that were AI-generated (*e.g.*, text, artwork), and then describe the AI-generated material in the “Other” field. For example, the “Other” field can be completed with words like “[description of content] generated by artificial intelligence.” If that material was then modified, supplemented, or compiled by a human, the “Material Included” column should be used to identify the human contribution.

When registering the copyright in a compilation or derivative work, an applicant is only required to provide “a brief, general statement of the additional material covered by the copyright claim being registered.”^[13] So too here, the Office suggests that a claim might be made to “[s]election, coordination, and arrangement of [describe human-authored content] created by the author and [describe AI content] generated by artificial intelligence.”^[14]

The Office’s guidance does not explain or provide examples of what might constitute a *de minimis* use of AI-generated content. Existing principles, however, establish that, in general, “[u]nclaimable material should be disclaimed only if it represents an appreciable portion of the work as a whole.”^[15] Thus, for example, quotations included in a literary work do not need to be disclaimed. By contrast, the use of a whole photograph in a compilation of photography would need to be disclaimed. The guidance’s reference to *de minimis* use suggests that trivial uses of AI-generated material do not need to be disclaimed on an application for registration.

The Office’s guidance poses a significant issue for an applicant who exerted significant influence, but not control, over an AI technology’s output, because the Office seems to believe that control is required to claim that a work is the product of human authorship.^[16] While we must wait to see whether courts will ultimately agree with the Office’s position on how much control a human must have over an AI technology to produce a copyrightable output, it appears that registrants may be unable to secure registrations claiming AI-generated material unless and until a court disagrees with the Office. In cases where an applicant believes that claiming AI-generated material may be appropriate, the applicant should pay special attention to the “Limitation of Claim” language used, both to avoid giving up a claim that may be meritorious and to try to justify a claim to the Office. However, such an effort may nonetheless be rejected by the Office.

5. When in Doubt, Provide a “Note to Copyright Office.”

To the extent the information provided on the “Author Created” and “Limitation of Claim” pages does not sufficiently capture the contributions by human authors and AI, respectively, applicants should explain further in the “Note to Copyright Office” field on the eCO “Certification” page.

Applicants who are not sure how to disclose AI-generated material are also invited to simply “provide a general statement that a work contains AI-generated material.”^[17] Then, the Office will contact the applicant for further information. However, doing so risks a delay in processing.

Correcting Pending Applications

Copyright owners with a pending registration application that does not disclose AI-generated material included in the work are instructed to contact the Copyright Office’s Public Information Office to disclose the matter. Office staff will note that disclosure for the examiner, who will correspond with the applicant to obtain additional information.

Correcting Existing Registrations

Copyright owners with an issued registration application that does not disclose AI-generated material included in the work are instructed to submit a supplementary registration, which can be used to correct an error or amplify information in a previous registration. The applicant can complete a supplementary registration by choosing the “Correct or Amplify an Existing Registration” option in eCO and following the directions described above to describe human authorship and disclaim AI-generated material.

* * *

Generative AI has only recently burst into public prominence, and the full spectrum of its capabilities and associated implications for copyright industries and copyright law have yet to be realized. For now, the Office instructs applicants to follow its recent guidance to avoid ineffective registration. Ineffective registration creates risks such as complicating future enforcement litigation,

including litigation being delayed for referral back to the Office,^[18] as well as potential statute of limitations issues and losing time-dependent advantages of registration such as statutory damages, attorneys’ fees, and the presumption of validity.^[19]

The Copyright Office’s guidance is just the beginning. For instance, the Office has launched an initiative to examine AI-related copyright issues, and will be holding “listening sessions” addressing those issues in the weeks to come.^[20] The Office has also announced its intent to publish a notice of inquiry later this year seeking public input on issues related to AI-generated works. Thus, further guidance from the Office will likely be forthcoming.

Footnotes

[1] *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, 88 Fed. Reg. 16,190 (Mar. 16, 2023), <https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright-registration-guidance-works-containing-material-generated-by-artificial-intelligence>.

[2] See Joseph Weizenbaum, *ELIZA—A Computer Program for the Study of Natural Language Communication Between Man and Machine*, 9 Comms. of the Assoc. for Computing Machinery 36 (Jan. 1, 1966).

[3] See US Copyright Office Review Board, *Decision Affirming Refusal of Registration of a Recent Entrance to Paradise* (Feb. 14, 2022), <https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf>.

[4] Complaint, ECF No. 1, *Thaler v. Perlmutter*, No. 1:22-cv-01564-BAH (D.D.C. Jan. 10, 2023). A motion for summary judgment is pending.

[5] US Copyright Office Review Board, *Cancellation Decision re: Zarya of the Dawn*, at 8 (Feb. 21, 2023), <https://www.copyright.gov/docs/zarya-of-the-dawn.pdf>.

[6] *Id.*

[7] *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

[8] *Kelley v. Chicago Park District*, 635 F.3d 290 (7th Cir. 2011) (case involving a garden).

[9] See 17 USC. § 411(b).

[10] See 17 USC. §§ 410(c), 412.

[11] US Copyright Office, Spring 2023 AI Listening Sessions, <https://www.copyright.gov/ai/listening-sessions.html>.

[12] *Urantia Foundation v. Kristen Maaherra*, 114 F.3d 955 (9th Cir. 1997).

[13] 88 Fed. Reg. at 16,192; see also US Copyright Office, *Compendium of US Copyright Office Practices* § 313.2 (3d ed. 2021) (“to qualify as a work of ‘authorship’ a work must be created by a human being”; the Office “will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author”).

[14] 88 Fed. Reg. 16,192.

[15] 88 Fed. Reg. at 16,193.

[16] 17 USC. § 409(9).

[17] 88 Fed. Reg. at 16,193.

[18] US Copyright Office, *Compendium of US Copyright Office Practices* § 621.2 (3d ed. 2021),

<https://www.copyright.gov/comp3/chap600/ch600-examination-practices.pdf>.

[19] See 88 Fed. Reg. at 16,192-93 & nn.28 & 30. As described above, the Office rejected an author’s claim to copyright in AI-generated imagery, despite the author describing a process in which she honed her prompts over hundreds of iterations to achieve her desired result. US Copyright Office Review Board, *Cancellation Decision re: Zarya of the Dawn*, at 8 (Feb. 21, 2023), <https://www.copyright.gov/docs/zarya-of-the-dawn.pdf>. The Office stated that the AI system “generated images in an unpredictable way” such that it was not a tool the author “controlled and guided to reach her desired image.” *Id.* at 9.

[20] 88 Fed. Reg. at 16,193.

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