

Navigating the Intersection of AI and Copyright: Key Insights From the US Copyright Office's Latest Report | ArentFox Schiff

Dan Jasnow, Emily B. Lewis, Natalie Tantisirirat

The [Report](#), as well as some recently approved copyright registrations, offer some of the clearest guidance yet with respect to copyright protection for works created in part with AI. Some key takeaways are below:

Prompts

Part 2 of the report, which was published following receipt of 10,000 comments from the public, reiterates that inputting prompts to create generative AI works does not, by itself, provide enough control for a human author to claim copyright protection for AI-generated outputs. The Copyright Office has disfavored prompting as a path to copyright protection since at least February 2023, when it rescinded a copyright registration issued to the artist Kristina Kashtanova for her graphic novel, *Zarya of the Dawn*, which featured AI-generated images. According to the Office, current generative AI tools do not provide human authors with sufficient control over how prompts are processed or interpreted, resulting in inadequate human involvement in the creative process. The Copyright Office does slightly open the door to re-visiting this decision in the future if, through technological developments, there “come[s] a time when prompts can sufficiently control expressive elements in AI-generated outputs to reflect human authorship.”

“Assistive” Uses

The Copyright Office attempts to differentiate between use of AI tools to “assist rather than stand in” for human creativity. In such circumstances, where the AI technology is used to “enhance human expression,” the use of AI technology does not limit copyright protection for the underlying work. The guidance specifically cites “aging or de-aging of actors” and “removing unwanted objects or crowds from a scene” as examples of assistive uses that would presumably not affect the availability of copyright protection for the work.

“Expressive Inputs”

The Copyright Office also indicates that copyright protection may be more forthcoming if creators use “expressive inputs” during their creative process, such as using a copyrightable work as part of a prompt. For example, if a creator were to create an original image or media file (by hand, Photoshop, or other), upload that image to an AI tool, and direct the tool to modify the image or file in various ways, the guidance suggests the creator “may have a greater claim to authorship” over the resulting work product because “there is a limited range of specific expressive output that is objectively foreseeable as a result of a human user’s contribution.” In other words, it is more likely that you could claim copyright protection in the resulting work product if you start with something original and direct the AI tool to modify it.

Recent Copyright Registrations

The Report notes that, since 2023, the Copyright Office has registered hundreds of works that incorporate AI-generated material, with the registrations covering “the human author’s contribution to the work.” One such work that has garnered some attention is a visual work created by Invoke AI, Inc., titled “A Single Piece of American Cheese.” Created using the Invoke AI platform, the work consists of an AI-generated image that was modified using a generative AI process called “inpainting,” which selectively modifies or regenerates parts of the image while maintaining consistency with the surrounding elements. In addition, the artist layered several additional AI-generated elements on top of the original image, including a third eye, melted cheese, and elements around the neckline.



While some commentary has inaccurately described the work as the first AI-generated image to obtain copyright registration, the copyright registration is in fact in line with recent Copyright Office guidance and practice. Rather than protecting the work as a whole, the copyright registration covers the “selection, coordination, and arrangement of material generated by artificial intelligence.” In other words, as with the *Zarya of the Dawn* case, the Copyright Office maintained that purely AI-generated material (i.e., the raw AI outputs used in the generation process) is not copyrightable, but the selection and arrangement of those elements are.

International Perspectives

The Copyright Office also examined how other countries are approaching copyrightability with AI-generated content. In 2023, for example, the Beijing International Court in China ruled that an

image created using Stable Diffusion was copyrightable, recognizing the user as the author due to their significant input through prompts and modifications. Similarly, in the European Union, a 2024 policy questionnaire revealed that most member states believe current copyright laws sufficiently address AI outputs, asserting that only works with substantial human input in the creative process are eligible for copyright, while purely AI-generated works are not.

Conclusion

Notwithstanding the Office's current position that works generated solely via prompts are ineligible for copyright protection, the Report suggests several pathways to copyright protection. To maximize one's chances of obtaining copyright protection, creators should consider:

- Developing a process to document their creative contributions and to differentiate human contributions from AI-generated content.
- Using human-authored expressive works as prompts.
- Using AI as an assistive tool to modify a human-authored work, rather than to create new expressive elements.
- Seeking copyright protection for the selection, coordination, or arrangement of AI-generated content, rather than the final work, as a whole.

Creators may also want to consider combining copyright protection with other intellectual property rights, such as trademarks and trade dress.

The final installment of the Copyright and Artificial Intelligence Report will cover the legal implications of using copyrighted works to train AI models, focusing on licensing issues and potential liability.

ArentFox Schiff will continue to monitor any further updates and guidance on the use of AI from the Copyright Office. For further inquiries or legal advice regarding AI and copyright issues, please contact your attorney at ArentFox Schiff's or any member of the [AI, Metaverse & Blockchain](#) group.