As AI Proliferates, Courts Are Tasked With Copyright Issues

By **Paul Llewellyn and Thomas Bird** (October 31, 2023)

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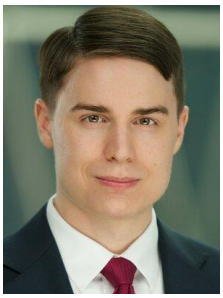

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With each passing day, artificial intelligence technologies seem to be more present in everyday life and increasingly commonplace across numerous industries.

Many generative AI technologies are capable of producing new expressive material, and many are trained on expressive material found online or elsewhere. The proliferation of these technologies and the works they generate have raised a number of novel and important questions in the field of copyright law.

Are AI-generated works eligible for copyright? What about works that contain a combination of human-generated and AI-generated content? And for the entities who create or use AI-technologies, what are the potential liabilities to keep in mind?

In this article, we hope to provide some high-level guidance on this cutting edge and rapidly evolving area of copyright law.

Copyright Registration

With AI's rise, copyright registrability is a key concern. U.S. copyright law protects

> original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[1]

Can AI-generated content meet this definition?

Earlier this year, the U.S. Copyright Office stated its position on this question, which was recently endorsed by the U.S. District Court for the District of Columbia.

On March 16, the Copyright Office released an official policy statement about registering works with AI content.[2] In June, the Copyright Office further discussed this policy in a webinar and addressed common questions on best practices.[3]

Simply stated, the Copyright Office's view is that U.S. copyright law only protects human-authored material. Accordingly, AI-generated content is not eligible for copyright and is deemed unclaimable.

In applications, the Copyright Office treats AI content like other unclaimable materials, such as previously published or registered content, public domain matter, or content owned by another.

This August, a federal district judge in the U.S. District Court for the District of Columbia endorsed the Copyright Office's position in Thaler v. Perlmutter. Thaler had challenged the Copyright Office's denial of registration of his AI-generated artwork, which he claimed was "autonomously created" by his AI system.[4]

The court ruled that "[h]uman authorship is a bedrock requirement of copyright," making AI-produced works ineligible.[5] The Copyright Office has stated it "believes the court reached the correct result."[6]

Does the inclusion of AI-generated content make a work entirely uncopyrightable? According to the Copyright Office's guidance, the answer is "no." Although the AI-generated portion isn't eligible, the human-generated portion can be — similar to the treatment of works containing public domain elements.

As stated in the Copyright Office's March 16 guidance, if a work contains an appreciable amount of AI-generated content, that content must be disclosed for exclusion from the application. If the AI contribution is de minimis, no disclosure is required.

What constitutes an appreciable versus a de minimis amount of AI-generated content? The Copyright Office elaborated on this in its June webinar, referencing the U.S. Supreme Court's 1991 Feist Publications Inc. v. Rural Telephone Co. Inc. decision, where the court held that a work must possess a minimal degree of creativity for copyright protection.[7]

To gauge if AI-generated content in a work is appreciable or de minimis, applicants should consider: If a human, not AI, had created this content, would it have the necessary quantum of creativity to meet the Feist standard?

If the answer to this hypothetical is yes, the AI-generated content is deemed appreciable, and applicants must disclose it for exclusion from the application. The Copyright Office may register the rest of the work, but not the AI-generated portions.

If the answer is no, the AI content is considered de minimis, and no disclaimer is needed, as it wouldn't qualify for copyright even if human-made. Either way, the AI-generated content will not be copyrighted.

In its June webinar, the Copyright Office provided helpful examples to illustrate these guidelines in action.

Disclosure is required for AI content.

- In a novel where a human authored the story and AI created illustrations, the artwork must be disclosed.

- In a rhyming couplet book, if AI produced some lines, those lines must be disclosed.

Disclosure is not required for AI content.

- In a textbook where AI checked spelling, inserted page numbers, or formatted text, no disclosure is needed.

- In a reality TV episode, AI-blurred faces or license plates don't need disclosure.

- If AI removes mud splashed on an actor's costume in a film scene, no disclosure is needed.

- In a novel where AI was used for brainstorming but not for generating any included content, no disclosure is needed.

The Copyright Office has indicated that disclosures about AI-generated material should be clear and succinct. Applicants should not list the AI technology or the company behind it as an author.

Generally, with the right disclosures, there is no need to omit AI content from the deposit copy of the work submitted with the application. However, to sidestep AI disclosure requirements, some may choose to register only the human-created component.

For example, if an author pens a book in Spanish and later uses AI to translate it into English, registering just the Spanish version avoids the need for AI disclosures.[8] Should the AI-translated version be infringed upon, it necessarily infringes the original Spanish version, thus enabling a copyright infringement claim.

In sum: The Copyright Office asserts that AI-generated content is unclaimable and ineligible for copyright. Human authorship is an absolute requirement. Appreciable amounts of AI-generated content in a work submitted for copyright must be disclosed and will be excluded from copyright protection.

Potential Copyright Infringement Liability

AI technologies also raise significant questions regarding how their use could give rise to copyright infringement liability. Recently, a number of copyright lawsuits have targeted AI system creators, particularly those using copyright-protected works for training.

One such case is Anderson. v. Stability AI Inc., filed in the U.S. District Court for the Northern District of California in January by plaintiff artists against Stability AI Ltd., Stability AI Inc., Midjourney and DeviantArt concerning Stable Diffusion, an AI that generates images based on users' text prompts.[9]

Plaintiffs allege that defendants used billions of copyrighted images, including their own, to "train" Stable Diffusion, with compressed copies of the images stored within the AI system. Using these training images, Stable Diffusion can produce new images through algorithmic processes.

The Anderson plaintiffs assert that defendants have directly infringed their copyrights by converting their original works into AI training images and making derivative works.

Plaintiffs also allege that defendants have vicariously infringed their copyrights by allowing Stable Diffusion to create images, upon the request of users, that emulate particular artists' styles and that such derivative works have been sold on commerce platforms.[10]

The district court will have to assess if either the use of copyrighted images for AI training or the generation of new images by the AI system qualifies as fair use, considering four factors:

- The purpose and character of the use;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.[11]

Defendants likely will rely on the U.S. Court of Appeals for the Second Circuit's 2015 Authors Guild v. Google Inc. decision,[12] where Google's digitization of copyrighted books for a searchable database was deemed transformative fair use.

However, plaintiffs may attempt to distinguish the cases by arguing that the Google case did not involve the creation of substitute works that potentially affected the marketplace value of plaintiffs' works.

Notably, the Andersen plaintiffs omitted a contributory copyright infringement claim. If made, it might have been evaluated by the U.S. Supreme Court's 1984 Sony Corp. of America v. Universal City Studios Inc. standard, under which selling a copying tool doesn't constitute contributory infringement if it has commercially significant noninfringing uses.[13]

Here, the defendants might reasonably argue that Stable Diffusion can likely create significant noninfringing works, especially if the creation of training images themselves are determined to be fair use.

Several other significant pending cases touch on AI and copyright. In Authors Guild v. OpenAI Inc. in September, the Authors Guild, joined by renowned authors such as George R.R. Martin and John Grisham, alleged that OpenAI improperly converted their copyrighted works into training data for ChatGPT.[14]

Comedian Sarah Silverman and additional authors filed a similar case in July against OpenAI.[15]

Potential future lawsuits may target the end-users of generative AI technologies, prompting the question: What actions constitute the volitional conduct required for direct infringement liability?[16]

Furthermore, given the Copyright Office's stance that AI-generated material is categorically unclaimable, can any entity freely reproduce any AI-created content? For those claiming injury, remedies may need to be sought outside traditional copyright law.

Future lawsuits might target e-commerce companies that host sellers of AI-produced products. If such AI-produced goods infringe copyrights, the commerce platforms could be deemed vicariously liable if they can oversee the infringing activity and directly profit from it.[17]

These issues continue to be evaluated inside and outside of courts. On Aug. 30, the U.S. Copyright Office issued a notice of inquiry on copyright and artificial intelligence, stating that it is undertaking a study of the increasingly complex policy issues raised by generative AI and assessing whether additional legislative or regulatory steps are warranted.

Regardless of the outcome of this study by the U.S. Copyright Office, the liability questions posed by Andersen and other litigation likely will be assessed by courts for many years to come, so the full scope of potential liability for developing or using AI technologies remains uncertain.

Further developments in this space will undoubtedly be watched closely because they have the potential to significantly alter the legal landscape around AI technologies.

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[1] 17 U.S.C. § 102(a); see also 17 U.S.C. § 101 (defining "machine" and "device" as one "one now known or later developed").

[2] https://www.copyright.gov/ai/ai_policy_guidance.pdf.

[3] https://copyright.gov/events/ai-application-process/.

[4] No. CV 22-1564 (BAH), 2023 WL 5333236, at *1 (D.D.C. Aug. 18, 2023).

[5] Id. at *4–7. The District Court acknowledged that future cases will likely involve more complex issues regarding the nuances of the human authorship requirement, including "how much human input is necessary to qualify the user of an AI system as an 'author' of a generated work,' the scope of the protection obtained over the resultant image, [and] how to assess the originality of AI-generated works where the systems may have been trained on unknown pre-existing works." Id. at *6. However, the Thaler decision did not address these issues because plaintiff informed the Copyright Office that the work was created "autonomously" by the AI and his claim to the copyright was based solely on his ownership of the AI system. Id.

[6] https://www.nytimes.com/2023/08/21/arts/design/copyright-ai-artwork.html.

[7] 499 U.S. 340, 345–48 (1991).

[8] See The Compendium of U.S. Copyright Office Practices § 709.1 ("A translation may be registered if it contains a sufficient amount of original expression. A translation that is performed by a computer program that automatically converts text from one language into another without human intervention cannot be registered because the conversion is merely a mechanical act.").

[9] Andersen v. Stability AI Inc, No. 3:23-cv-00201 (N.D. Cal.).

[10] While no individuals who used AI to create allegedly infringing works were named as defendants in the Andersen case, they were referenced as individuals committing infringement, and it is not unthinkable that such individuals could be named as defendants in similar future litigation.

[11] 17 U.S.C. § 107.

[12] 804 F.3d 202, 229 (2d Cir. 2015).

[13] 464 U.S. 417, 442 (1984).

[14] Authors Guild v. OpenAI Inc., No. 1:23-cv-08292 (S.D.N.Y.).

[15] Silverman v. OpenAI, No. 3:23-cv-03416 (N.D. C.A.).

[16] See Perfect 10, Inc. v. Giganews, Inc., 847 F.3d 657, 666 (9th Cir. 2017) (stating that the "so-called 'volition' element of direct infringement . . . is a basic requirement of causation. As its name suggests, direct liability must be premised on conduct that can reasonably be described as the direct cause of the infringement.") (citation omitted); Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 130–31 (2d Cir. 2008).

[17] See Erickson Prods., Inc. v. Kast, 921 F.3d 822, 829 (9th Cir. 2019).