ML STRATEGIES

US Copyright Office Publishes Second Part of Report on AI Copyrightability — AI: The Washington ReportUS Copyright Office Publishes Second Part of Report on AI Copyrightability — AI: The Washington Report

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VIEWPOINT TOPICS

- Artificial Intelligence

- The United States Copyright Office issued the second part of its Report on Copyright and Artificial Intelligence (Report), which focuses on the question of how AI affects copyrightability.
- This segment of the Report reaffirms the office's view that copyrightability requires human authorship, which must include sufficient human input and creativity. It also concludes that AI copyrightability issues can be resolved under existing law.
- Part 3 of the Report, which will focus on the question of the use of copyrighted materials to train AI models, is expected to be released in the first quarter of 2025. Numerous courts are also wrestling with the same question in lawsuits brought by the creative industry and may bring additional clarity this year as well.

On January 29, 2025, the United States Copyright Office issued the **second part** of its Report on Copyright and Artificial Intelligence. Part 2 of the Report focuses on the question of how artificial intelligence affects copyrightability, while **Part 1**, issued in July 2024, examines existing legal protections for digital replicas. The Report stems from an August 2023 **Notice of Inquiry** by the Copyright Office seeking public input on AI copyright issues, which followed a March 2023 **statement of guidance** for registering works with AI-generated content. In the run-up to producing the Report, the Copyright Office received more than 10,000 comments.

The final, forthcoming part will address the legal implications of training AI models on copyrighted works, licensing considerations, and the allocation of any potential liability.

The 41-page Part 2 of the Report does not come to many bright-line conclusions. The office adhered to the view that copyrightability is determined on a case-by-case basis. It also reaffirms its view that copyrightability requires human authorship, which must include sufficient human input and creativity. The office did offer eight conclusions and recommendations:

- Questions of copyrightability and AI can be resolved pursuant to existing law, without the need for legislative change.
- The use of AI tools to assist rather than stand in for human creativity does not affect the availability of copyright protection for the output.
- Copyright protects the original expression in a work created by a human author, even if the work also includes AI-generated material.
- Copyright does not extend to purely AI-generated material, or material where there is insufficient human control over the expressive elements.
- Whether human contributions to AI-generated outputs are sufficient to constitute authorship must be analyzed on a case-by-case basis.
- Based on the functioning of current generally available technology, prompts do not alone provide sufficient control.
- Human authors are entitled to copyright in their works of authorship that are perceptible in AI-generated outputs, as well as the creative selection coordination, or arrangement of material in the outputs, or creative modifications of the outputs.
- The case has not been made for additional copyright or sui generis protection for AI-generated content.

Part 2 does attempt to put some meat on the bones of its conclusions and recommendations. For example, as the foundation for its conclusion that copyrightability questions surrounding AI can be resolved under existing law, Part 2 of the Report invokes the legislative history of the 1976 Copyright Act,

asserting “[t]he history of copyright law has been one of gradual expansion in the types of works accorded protection.” (p. 1). It also marshals how, over time, the Copyright Office and the courts have found the law to be sufficiently flexible to resolve issues regarding earlier technologies, for instance, photographs, motion pictures, video games, and computer programs.

A significant portion of this segment of the Report deals with the question of whether prompts standing alone are sufficient to make the output copyrightable. After defining a “prompt” as a common type of input, often in the form of text, that communicates the desired features of the output, Part 2 answers the question in the negative.

Part 2 of the Report notes that “the output of current generative AI systems may include content that was not specified and exclude content that was… [M]any popular AI systems are unpredictable in the sense that their outputs may vary from request to request, even with an identical prompt.” (p. 6)

After a legal discussion regarding copyrightability in arguably analogous circumstances, this section of the Report then engages in a detailed discussion of three kinds of human contribution to AI-generated outputs: (1) prompts that instruct an AI system to generate an output; (2) expressive inputs that can be perceived in AI-generated outputs; and (3) modifications or arrangements of AI-generated outputs.

With respect to prompts, after a long recitation of comments about their use, accompanied by picture examples, the office concluded that “prompts alone do not provide sufficient human control to make users of an AI system the authors of the output. Prompts essentially function as instructions that convey unprotectable ideas. While highly detailed prompts could contain the user’s desired expressive elements, at present they do not control how the AI system processes them in generating the output.” (p. 18)

The office suggests a different conclusion with respect to “expressive inputs,” which it defined as when AI systems allow input to be substantially retained as part of the output. For example, a human author might create an original illustration, input that work into an AI system, and instruct the system to modify the color of the existing image. (p. 22) Part 2 suggests that when a human inputs their own copyrightable work and that work is perceptible in the output, they will be the author of at least that portion of the output. The protection “may also cover the selection, coordination, and arrangement of the human-authored and AI-generated material, even though it would not extend to the AI-generated elements standing alone.” (p. 24)

Finally, with respect to modifying or arranging AI-generated content, the office had previously offered guidance that “a human may select or arrange AI-generated material in a sufficiently creative way that ‘the resulting work as a whole constitutes an original work of authorship.’” (p. 24) Part 2 of the Report illustrates with examples how AI “tools can enable the user to control the selection and placement of individual creative elements. Whether such modifications rise to the minimum standard of originality required…will depend on a case-by-base determination.” (p. 27)

Part 2 of the Report then briefly canvassed international approaches. While acknowledging that the issue was somewhat in flux around the world, some level of consensus on the need for human authorship appears to be emerging. (p. 31)

The document concludes by assessing the arguments for legal change and finds them unavailing. The arguments included providing incentives for the creation of more works, even to the point of creating new sui generis rights; countering international competition; and providing greater clarity. The office thought that existing law was sufficient and that providing greater clarity would be difficult to achieve. (p. 40)

As this section of the Report emphasizes, the Copyright Office plans to approach the question of copyrightability on a case-by-case basis. The decisions on specific copyright applications that raise these questions, as well as litigation, should bring additional clarity to the degree of human input necessary to permit copyrightability where AI is involved. We will continue to monitor the evolution of this important question and encourage you to contact any of us if you have questions.

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