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Copyright Office Report Confirms Copyrightability of AI-Generated Works

by

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On January 29, the U.S. Copyright Office released its report on the copyrightability of outputs that are created using generative artificial intelligence (AI). In its admirable report, the Office reaches the correct conclusion that existing copyright law is sufficient to address questions regarding when works created using generative AI receive copyright protections. No special or extra class of protections are needed for AI-generated outputs.

As the Copyright Office reaffirms in its report, the fundamental principle of human authorship was established in the Constitution's Copyright Clause and the Copyright Act, and recognized in Supreme Court jurisprudence. Those legal sources provide reliable guidance for the Office and courts to address decisions about the copyrightability of works created using generative AI. Congress should take the side of restraint and leave it to the Copyright Office and courts to apply existing copyright principles and rules to AI-related copyrightability issues on a case-by-case basis.

The Copyright Office's latest installment on copyrightability is the second part of its three-part *Report on Copyright and Artificial Intelligence*. The report's first part addresses digital replicas, and the third part is forthcoming.

The Office defines an artificial intelligence (AI) system as a "software product or service that substantially incorporates one or more AI models and is designed for use by an end-user." It describes AI models as consisting of computer code and numerical values designed to accomplish tasks like generating text or images. As the Office observes in the report, many publicly available AI systems generate outputs based on one or more "prompts" entered into such systems by users. Such prompts typically are in the form of text describing a topic, theme, or idea.

The Office's overarching conclusion that "[q]uestions of copyrightability and AI can be resolved pursuant to existing law, without the need for legislative change," rests on the constitutional foundations for copyright protections. Article I, Section 8, Clause 8 of the U.S. Constitution confers on Congress the authority to "secur[e] for limited times to authors . . . the exclusive right to their . . . writings." The Copyright Clause is unique in that it is the only provision in the Constitution of 1789 that expressly protects individuals' rights. As Free State Foundation President Randolph May and I wrote about in our book, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective*, at the time of the American Founding, copyrights were viewed as unique private property rights rooted in the fruit of a person's labors. The Copyright Clause reflects this property rights understanding by authorizing legal protections for an individual's exclusive rights in his or her creative labors to provide financial incentive for authors or creators to undertake those labors and disseminate their works in the public market.

The Constitution's intended purpose to secure the life, liberty, and property of "We the People," has received recognition by decisions of the Supreme Court such as *Community for Creative Non-Violence v. Reid* (1989) that "the author [of a copyrighted work] is…*the person* who translates an idea into a fixed, tangible expression entitled to copyright protection." In its report, the Office wisely reaffirms its longstanding view that "copyright protection in the United States requires human authorship." Indeed, the Office could hardly conclude otherwise. Although the Copyright Act of 1976 does not define an "author," the law's recognition of protections for "original works of authorship fixed in any tangible medium" undoubtedly is premised upon human creativity. The October 2023 *Thaler v. Perlmutter* decision by the U.S. District Court for the District of Columbia determined that "[t]he 1976 Act's 'authorship' requirement as presumptively being *human* rests on centuries of settled understanding."

The District Court's decision in *Thaler* received a positive review in my November 2023 *Perspectives from FSF Scholars*, "Copyright Case Affirming Human Creativity Sets the Stage for AI Issues." Petitioner Thaler filed for a copyright registration and framed his case on the premise that the creative work at issue was generated autonomously by a computer. The court determined that the Copyright Office did not act arbitrarily or capriciously under the Administrative Procedure Act in denying the copyright registration for a work (supposedly) autonomously created by a computer because "United States copyright law protects only works of human creation" and "human authorship is a bedrock requirement of copyright."

In its report, the Copyright Office cites *Thaler* as the first court decision to specifically address the copyrightability of AI-generated outputs. That decision, which is now pending appeal before the U.S. Court of Appeals for the District of Columbia, ought to be affirmed.

Beyond the unusual bright-line issue presented in *Thaler*, the Copyright Office astutely observes that "[i]n most cases, however, humans will be involved in the creation process, and the work will be copyrightable to the extent that their contributions qualify as authorship." Moreover, the Office explains that "[f]or a work created using AI, like those created without it, a determination of copyrightability requires fact-specific consideration of the work and the circumstances of its creation."

The Office cites *Burrow-Giles Lithographic Co. v. Sarony* (1885) as instructive for analyzing the copyrightability of works created by an author using generative AI. In *Sarony*, the Court considered a constitutional challenge to protections in photographs based on the argument that photos were not copyrightable because they lacked human authorship and were instead the product of a machine. It rejected that challenge. The Court defined an "author" as "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature." Also, the Court observed the many different affirmative creative choices made by the photographer in selecting and arranging the props and scenery for the photo to achieve the particular expression intended. In the Office's words, the takeaway from *Sarony* is that "the use of a machine as a tool does not negate copyright protection, but the resulting work is copyrightable only if it contains sufficient human-authored expressive elements."

Looking at the state of publicly available AI technology, the Office concludes that "prompts alone do not provide sufficient human control to make users of an AI system the authors of the output." In the Office's view, the AI system appears to perform the decisive role of converting or translating a user's abstract or generic prompt, such as a subject or topic, into a concrete output. By relying on an AI system to determine the resulting output, the user lacks sufficient control over its expressive elements. As the Office notes, a user's lack of control is reinforced in cases involving AI systems that can generate myriad different outputs from identical prompts. And it observed that a user's control over the expressive elements of outputs is even more attenuated when using AI systems that modify or rewrite user prompts as part of the system's internal processes.

Moreover, the Office explains that AI system outputs generated from one or a series of abstract or generic user prompts that simply communicate a desired outcome are not copyrightable because "[p]rompts essentially function as instructions that convey unprotectible ideas." The "idea/expression dichotomy" is a longstanding principle of copyright law and codified in Section 102(b) of the Copyright Act. According to this principle, ideas are prohibited from being copyrighted, but expressions of idea in tangible media may be protected. Individual images, movies, and recorded songs can receive copyright protection, but not the underlying abstract ideas, concepts, themes, or facts that are expressed through those works.

Although the Office correctly identifies simple user prompts intended to generate outcomes with unprotected ideas, the report also carefully distinguishes them from "expressive inputs." The

Office acknowledges that copyrightable original expressions of ideas by human authors may be input into an AI system. In such instances, the author of the copyrightable "expressive inputs" will at least be the author of the portion of the output that is identical or substantially similar to such inputs. That is, "copyright in this type of AI-generated output would cover the perceptible human expression."

Additionally, copyright protection may extend to "the selection, coordination, and arrangement of the human-authored and AI-generated material," but not the AI-generated expressive elements of the output standing alone." Whether such modifications are enough to be deemed sufficiently original to meet the requirement for copyrightability depends on case-by-case determinations. Notably, on February 10 of this year, AI platform Invoke announced that it has received what appears to be the first ever copyright registration for an AI-generated image, "A Single Piece of American Cheese." Following Copyright Office guidelines, Invoke explained that it "claimed rights in the selection, coordination, and arrangement of the inpainted components of the composite image, but not the individual AI-generated inpainted segments." The AI platform kept detailed records of the multi-step process it undertook to refine elements and add concepts to the uniquely designed AI-generated output.

Importantly, the Copyright Office rejects the view that AI outputs as such – that is, without sufficient human control over the expressive elements – deserve their own specialized or unique type of protections – or *sui generis* rights (rights of its own kind). As the Office recognizes, "because copyright requires human authorship, copyright law cannot be the basis of protection for works that do not satisfy that requirement." It reiterates that the key purpose behind the Copyright Clause and the Copyright Act is to ensure that *human* authors or creators have sufficient financial incentives to dedicate their creative labors and resources to creating original works and thereby promote progress. Thus, the Office rightly expresses concerns about the impact that *sui generis* rights would have on the rights of human creators and the value of their creative works to the public. That is, "[i]f a flood of easily and rapidly AI-generated content drowns out human-authored works in the marketplace, additional legal protection would undermine rather than advance the goals of the copyright system."

Congress should heed the Copyright Office's well-reasoned recommendation against creating new positive *sui generis* rights for AI outputs. As the Office's report shows, copyright protections do extend to humanly originated and sufficiently controlled AI-generated works. No compelling reasons exist for concluding that such protections are inadequate. Nor does there appear to be any identifiable market failures regarding generative AI services or harm to consumers that would be remedied by recognizing a new class of special rights or additional protections for AI-generated outputs that lack a human author's originality or creative control over its expressive elements.

Congress also should adopt the Copyright Office's conclusion that "existing legal doctrines are adequate and appropriate to resolve questions of copyrightability." Although legislation about AI technologies in the marketplace may be advisable in some circumstances – such as nationwide protections from unauthorized harmful digital AI replicas of individuals' likenesses and voices – it is likely that, in most instances, existing legal principles and rules will be sufficient to address the issues.

At the very least, Congress should generally favor restraint and afford ample time and opportunity for longstanding legal principles and rules to be brought to bear on AI-related issues before targeting them with copyright legislation. When it comes to the copyrightability of works created using AI systems, the Copyright Office and the courts should address issues as they come up, applying copyright principles and rules to AI-generated works on a case-by-case basis.

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Further Readings

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