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ARTIFICIAL INTELLIGENCE

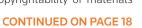## Q&A: Defining rules for new technology — What the Copyright Office's report on AI means for IP attorneys

By Patrick H.J. Hughes

The U.S. Copyright Office is in the process of releasing a three-part report on how the introduction of artificial intelligence affects copyrighted works, copyright laws and those who deal with them.

McKool Smith attorney Avery Williams, who has extensive experience representing clients in emergent disputes concerning infringement related to AI-generated content, shed some light on issues discussed in the report.

Westlaw Today: The Copyright Office on Jan. 29 released the second part of its three-part report over AI. What did this second part cover?

Avery Williams: Part 2 of the Copyright Office's report covered the copyrightability of materials

REUTERS/Dado Ruvic

EXPERT ANALYSIS

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Finnegan, Henderson, Farabow, Garrett & Dunner LLP attorneys Aaron Capron, Adam Boger, Kai Rajan and Andrew Schneider explain how recent government guidance for evaluating the patent eligibility of artificial intelligence inventions appears inconsistent with case law.

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Anthony J. Dreyer, Karen M. Lent and Jordan A. Feirman of Skadden, Arps, Slate, Meagher & Flom LLP explore recent litigation highlighting the consequences of unauthorized use of music on social media and provide takeaways for avoiding infringement disputes.

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generated by artificial intelligence. The office's key finding is that prompting alone is insufficient to confer authorship and copyrightability. AI-generated materials are therefore not copyrightable unless a human takes steps to directly augment or transform the copyrighted work, and even then, only the augmentative or transformative elements are copyrightable.

> The Copyright Office's ruling here has rendered millions of works essentially authorless.

The office drew a line between using AI to "assist" in creating a work and using AI to generate the work itself. For example, a user could ask ChatGPT to create an outline for a short story, which the user could use as the basis for a story with no fear of creating a copyrightability issue. On the other hand, the story would not be copyrightable if the user had prompted ChatGPT to write the story itself.

The Copyright Office found that no new legislation is needed to address the copyrightability of AI-generated materials. Several groups called for new laws to clarify or adjust the ability to protect AI-generated materials, but most comments the office received suggested no new legislation is needed.

WT: You say that the Copyright Office found that no new legislation was needed to address copyrightability concerns.

What reason does the agency give for this finding?

AW: The short answer is that the Copyright Office found that it could determine whether AI-generated works were copyrightable by applying existing law through analogy. The office has been reinterpreting copyright law for decades as new technologies come online. They believe generative AI is just the latest step in that long history. The office expects that the courts will play a role in developing this new legal landscape, and specifically recognized that the courts will weigh in on the Copyright Office's registration decisions. Having a registered copyright is a prerequisite to filing a lawsuit for copyright infringement, so the Copyright Office's decision that AI-generated materials, on their own, are generally not copyrightable means the first battles will likely be over the Copyright Office's refusal to register a copyright on an AI-created work.

WT: Many have speculated that attorneys have been eagerly awaiting the second part of the series in particular. Why were attorneys eager to hear these results? Was this second part particularly controversial?

AW: Everyone was waiting for the Copyright Office's position on whether prompting could confer authorship over a work, and therefore make the work copyrightable. Under U.S. copyright law, a human being has to be the author of a work. Many people will remember that famous monkey selfie, where a macaques took a photographer's camera and inadvertently snapped a picture of itself. The picture went viral, but it turned out that nobody could own the copyright to that photo, because no human being took the picture.

The Copyright Office's ruling here has rendered millions of works essentially authorless. Previously, courts split on whether, through iterative prompting and selecting alternative outputs, a user could have enough creative input to be considered an author of the work. Courts also differed on where to draw that line. This report from the Copyright Office does provide some certainty and predictability, but there will absolutely be lawsuits challenging the office's position.

WT: Part of the Copyright Office's findings was based on past litigation — some of which transpired even before ChatGPT was released. What were some of the important cases that affected the agency's findings?

AW: The line of cases accepting technological advances in creation of copyrightable works is fundamental to the idea that AI-assisted works and works containing AI-generated elements can be copyrightable. The photography cases are good examples. Many of the same questions of authorship and creativity that surround the use of generative AI also emerged with the advent of photography. And there is now a wealth of case law concerning photography copyrights that we can see reflected in the Copyright Office's second report. For example, "generic" elements of a photograph are generally not as protectable as novel elements. But even generic elements are protectable in a unique arrangement. The Copyright Office's treatment of AI-generated elements echoes the treatment of generic elements of a photograph — they are protectable in a novel arrangement, or with substantial alteration by a human author.

WT: What sort of impact could the Copyright Office's findings have on future copyright litigation?

AW: The initial battle lines seem pretty clear. I expect we will see a series of cases involving the copyrightability of AI-generated works with varying levels of human augmentation or changes. The courts will need to work out just how much human involvement is needed to draw the line between a work where AI "assisted" in generating the work, and a work that an AI program essentially generated in response to a prompt. I expect we will also see challenges to the general position that prompting alone can never be sufficient to confer authorship and copyrightability.

WT: As you know, the Copyright Office first outlined its intentions to release a three-part report in August 2023, when

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it announced a Notice of Inquiry seeking public input on copyright issues related to AI. What different perspectives did the agency encounter?

AW: That's a broad topic. The Copyright Office received thousands of responses — from creative professionals and Hollywood guilds to AI companies to massive content owners like Disney. Interestingly enough, while most of the responses said that no new legislation was needed, groups with directly opposing views all claimed that existing laws supported their own positions. Of course, they can't all be right. I suspect that we're really seeing arguments from industry groups, rather than a genuine assessment of the need for new laws. Nobody wants to admit that their position is unsupported without an act of Congress.

WT: The first part of the Copyright Office's findings was released July 31, 2024. What was the subject matter of that part of the report?

AW: The Copyright Office's first report focused on the need for new legislation to deal with the issue of "digital replicas," or "deepfakes." There have been a number of high-profile deepfake videos and images in the past couple of years, from a group of thieves who impersonated a corporate officer to a series of lewd images impersonating Taylor Swift. The office noted that digital replicas have many legitimate uses, as well, including helping people with disabilities create new content.

WT: Did the Copyright Office find that new legislation was needed to address digital replicas?

AW: Yes. The Copyright Office recommended that Congress adopt new legislation protecting the rights of an individual to their own digital replicas. The office found that no single law covered the issues of deepfakes, and that current federal laws did not offer adequate protections.

WT: One part of the report remains to be released to the public. What issues will the third part cover? And what recommendations do you think the Copyright Office will offer to address what it gathered from the inquiry regarding this third part?

AW: According to the Copyright Office, the final report will "address the legal implications of training AI models on copyrighted works, licensing considerations and the allocation of any potential liability." The biggest area of litigation in generative AI right now is whether the use of copyrighted materials to train generative AI systems falls under the "fair use" exception to copyright infringement. Breaking that down a bit, there is no dispute that generative AI companies like ChatGPT and Midjourney have trained their models using copyrighted works. There also appears to be no dispute that the training process involves making copies of those copyrighted works. The multibillion-dollar question before dozens of courts is whether the copying is "fair use" and therefore not copyright infringement. Fair use is usually reserved for academic, journalistic or noncommercial use. Whether fair use applies to generative AI training is a huge issue.

It is hard to say whether the Copyright Office will endorse the fair use doctrine for generative AI training. But I hope that the Copyright Office recognizes the interests of copyright holders. Copyright protections have long acted to protect a work like a movie or a book. Generative AI can replace not only a creative work, but the creative worker. If generative AI companies can take the collective works of humanity without compensation and create a system that replaces those artists, performers, producers and other rightsholders, I think we will see a substantial chill in the creative market.

Generative AI has many wonderful uses. It can inspire and create things that are beyond what humans have ever done. But generative AI stands on the shoulders of millions of copyrighted works and workers that make those systems possible. It is difficult to imagine a policy reason why the copyright holders should not be compensated for the use of their intellectual property.

WT: Finally, do you personally have anything to offer those working in the media and entertainment sectors who are seeking guidance on how to handle AI and legal matters?

AW: I would encourage creative professionals and content owners to lobby their legislators and make their perspectives heard. The biggest battle right now is the use of copyrighted materials to train generative AI models. AI companies claim that they can use literally any materials they can find to train their models, from books to movies and television broadcasts, and that they do not have to compensate any of the copyright holders for that use of the copyrighted materials. **WJ**