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Will the US Copyright Office's AI Stance Create More Problems Than It Solves?
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As the office rejects AI prompts as a basis for copyright, legal experts warn its approach could potentially leave millions of AI-generated works in limbo, finds Marisa Woutersen.

The US Copyright Office's latest report on AI and copyright has sparked mixed reactions within the IP community.

Some have praised the office's reaffirmation of human authorship as fundamental while others criticise its stance as impractical and overly rigid.

Critics argue that the office's rejection of AI prompts as a basis for copyright and its reliance on joint authorship principles could create enforcement challenges and uncertainty.

Among the noise is a recurring opinion that the office should lead on copyright protections for AI, rather than deferring to the courts to settle unresolved questions through ongoing litigation.

Key findings of the report

At the end of last month, the US Copyright Office released part two of its artificial intelligence and copyright report.

The second part of the report series asks the key question: Can outputs from generative AI qualify for copyright protection under existing US law?

The office's stance is that the outputs of generative AI can be protected by copyright only where a human author has determined "sufficient expressive elements".

This can include situations where a human-authored work is perceptible in an AI output, or a person makes creative arrangements or modifications of the output—but not the mere provision of prompts.

The office confirms that the use of AI to assist in the process of creation or the inclusion of AI-generated material in a larger human-generated work does not bar copyrightability.

It also found that existing copyright law sufficiently addresses the issues raised by AI, negating the need for a legislative change at this time.

After the office published its position, it granted registration to *A Single Piece of American Cheese*, a work created using Invoke AI with human involvement.

The decision reinforced the Copyright Office's stance and applied its guidelines in practice.

Its latest report builds on its initial 2024 publication, which looked at digital replicas of individuals' voices and appearances. Future parts are set to tackle AI training on copyrighted material and related licensing considerations.

Ron Dreben, partner at Morgan Lewis, says that there is "little surprising" in the report, which does not propose new legislation for AI copyright protection.

Sarah Bro, partner at McDermott Will & Emery agrees, noting the report "does not change the basics of US copyright law or the office's original guidance that human authorship is fundamental".

Office's stance 'impractical'

However, maintaining the status quo may be a problem in itself. Michael Word, member at Dykema, criticises the office's stance, calling its approach to AI-assisted artworks "impractical and untenable".

He argues that by treating AI as a "co-author," the office wrongly applies joint authorship principles, assuming it can fall back on these principles to create a framework to analyse copyrightability of work involving AI.

"But this is an inherently flawed analogy," Word adds.

He warns that the office's reliance on applicant disclosures raises accuracy concerns, as AI systems cannot advocate for its contributions like human co-authors can.

He explains it's an "obvious distinction, but it's also an important one that has significant ramifications and creates significant issues when it comes to enforcement".

Unlike joint authorship cases, where a co-author can challenge an applicant's claim, AI systems can't dispute or provide evidence of their role.

"It may work in the near term and may serve as a convenient rubric for determining registrations, but it will ultimately break down when it comes to enforcement of registrations.

"The Copyright Office's position is short-sighted and is going to create more problems that it is trying to solve," Word cautions.

The outcome, he argues, will be a "cloud of uncertainty" over the validity of AI-generated works and a lack of practical means to resolve this uncertainty short of litigation.

He urges the office to treat AI systems as a tool rather than a co-author.

AI prompts and authorship

The office outlines that prompts alone, no matter how detailed, are insufficient to establish authorship of AI-generated works—a stance that has drawn criticism from the IP community.

Dreben notes that the office spends a lot of time explaining this position.

"One example the office cites about that lack of human control is that the same prompt usually generates different outputs," Dreben explains.

The office also describes AI-generated content as "the system's interpretation of the prompts, which is not human authorship."

Dina Blikshteyn, partner at Haynes Boone, points out that the office differentiates between prompts that describe an output, which are not copyrightable, and those that include creative expression, which may be.

However, she warns that this distinction introduces subjectivity and could lead to "significant uncertainty and potential litigation" over whether a given work qualifies for copyright protection.

Word criticises the office's stance as "having gone too far", arguing that its position on prompts lacks strong evidence and is "shocking" given the wide range of AI systems and prompting methods available.

"You can come up with any number of counterexamples where 'prompts' would be sufficient to establish authorship," Word argues.

Avery Williams, principal at McKool Smith, warns that this policy could leave "hundreds of millions of images essentially authorless".

While "courts have split on the question of whether, through iterative prompt engineering and image selection, a prompter could establish enough creative control to be considered an author," he notes that if they adopt the office's view, it would "leave many AI-generated works unprotected, even if substantial effort had gone into iterative prompting and generation".

"Predictability is good for the law," Williams adds, "but it remains to be seen if courts will entirely ignore prompting as a form of creative input".

Word acknowledges that the office left room to reconsider its approach and hopes it would take advantage of the opportunity to revisit its position in the future.

Divided opinion on existing laws

Matthew Braunel, partner at Thompson Coburn, acknowledges that "the law always lags behind technology" but believes existing US copyright laws—which require human creativity—are "flexible enough" to handle AI-related issues.

By reaffirming the importance of human creativity, Braunel argues, the office has set "a strong foundation for navigating the complexities of AI-generated works".

However, he stresses that ongoing updates to the compendium of office practices will be crucial to keeping the framework relevant and effective.

Word agrees that "current laws are sufficient for the time being" but warns that if the office continues assessing AI-assisted artworks through a "joint authorship" lens rather than treating AI as a tool, correction may be needed.

"If the courts don't provide that correction, then it may fall on Congress to act," he adds.

David Weslow, partner at Wiley Rein, sees the office's position as offering "flexibility" in deciding copyright eligibility.

However, he warns that its ‘case-by-case’ approach is likely to lead to “further delineation of the standards for copyright protection,” as registrability decisions are made by the office while courts assess their validity.

Bro finds the latest report helpful in providing guidance but doesn’t fully agree that existing US copyright laws go far enough or that the office should not consider *sui generis* protection.

“I believe that the outputs of certain human-authored AI prompts should be considered for copyright protection, because I think the current laws and guidance will leave a great deal of suitably original work on the table with zero ownership rights or copyright protection,” she explains.

Blikshteyn believes the office is allowing the law and AI technology to evolve within the existing legislative framework before making changes.

Similarly, Dreben predicts that amendments to the Copyright Act will eventually be necessary as AI-assisted works become more common.

Advice for creators and AI companies

Braunel explains the office’s stance has important implications for both AI companies and the creative industries.

“Inexperienced prompters might face challenges in navigating these legal requirements,” he says. “But clear guidelines can help them understand how to comply with copyright laws.”

The biggest impact, according to Braunel, will likely be on content creators who rely heavily on AI, as they’ll need to ensure their work meets copyright standards.

“For creators, it's essential to understand the importance of human creativity in the copyright system and to ensure that their creative contributions are evident in their works and that the human author can explain the human creative contribution,” he explains.

Braunel also suggests AI companies might consider adjusting their offering features to give users more control over AI-generated content—allowing for more predictability and human control, which could strengthen the prompter’s arguments in favour of protection.

Dreben recommends AI creators focus on including and and being able to explain human authorship in their AI-related works.

He also points out that AI companies may need to push for legislative changes to secure protections for using copyrighted materials in AI training—especially if the Copyright Office and courts don’t establish a consistent fair use policy.

Bro echoes Dreben, suggesting creators keep clear records of human authorship contributions to AI-generated work—especially as it relates to human-authored modifications and arrangements of AI output to support registrability as well as future enforcement or litigation.

Will the US’ global AI race be affected?

Dreben warns that if AI-assisted works become too difficult to protect under US copyright law, companies may restrict how employees and contractors use AI, potentially slowing its development.

However, he believes the productivity and creative advantages of AI are likely to "keep interest in development and deployment going strong in the US".

Braunel suggests that the office's emphasis on human authorship could influence the US' global position in the 'AI race'.

By maintaining this focus, he argues, the US can promote innovation while ensuring responsible AI development.

"This balanced approach can help the US remain a leader in both AI development and the protection of IP," he says.

Braunel also notes that while differences in copyright laws between countries have always existed, AI technologies could "deepen this divide" as different countries apply different standards to copyright protection for AI-generated works.

Bro echoes this concern, warning that the country's competitive edge could be harmed by the misalignment between US and foreign protection of AI-generated works—especially those works recognising authorship based on prompts alone.

Works that are not protectable, and not subject to exclusive rights and ownership by an author, may be ownable and protectable in non-US jurisdictions.

"This could cause creators to choose non-US markets for the creation and enforcement of their works," she explains.

Clarity needed as the office prepares for more guidance

As the release of part three of the Copyright Office's AI guidance looms, experts are eager for clarity on key issues.

Braunel hopes the report will provide a detailed discussion on AI model training and licensing considerations.

He notes that upcoming court decisions, such as *Thompson Reuters Enterprise Centre GMBH et al. v Ross Intelligence* may help shape the guidance.

Braunel also suggests that the office could look to concepts from the 1909 Copyright Act, which offered flexibility in determining damages that might be useful guidance for the current issues.

Dreben hopes that if the office deems certain AI training practices to be copyright infringement, it will also "recommend legislation that is reasonable and fair to creators, AI service providers, and the public."

For Bro the need for guidance on the most pressing issues currently being litigated is crucial.

This needs to clarify "whether certain training of AI models might constitute transformational uses that qualify as fair use; and/or whether the USCO is considering licensing frameworks that might include statutory or compulsory licenses to allow for the use of certain data or information for AI model training," she concludes.