

Copyrightability of AI-assisted works – Copyright Office report | IP Frontiers

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In January 2025, the Copyright Office released the second of two reports providing guidance for copyrightability and artificial intelligence (AI) in response to its August 2023 Notice of Inquiry. See <https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf>. The most recent report investigates the type and level of human contribution that would allow a creative work that uses generative AI to be protectable. The guidance considers different uses of AI, policy implications, and how other countries have responded to AI in copyright.

In the first report, issued in July 2024, the Copyright Office focused on the gap in existing legal protections for digital replicas in response to the unprecedented rise digitally created or manipulated videos, images and audio recordings that falsely depict an individual. See <https://www.copyright.gov/ai/Copyright-and-Ar->

tificial-Intelligence-Part-1-Digital-Replicas-Report.pdf. In that report, the Copyright Office recommended Congress enact a new federal law to protect individuals from unauthorized digital replicas.

In this second report, the Copyright Office issues a conclusion and guidance on whether new copyright laws are needed to address the advent of AI and provides additional clarity on the copyright protection of AI creative works in the United States, purportedly taking into account input from over 10,000 stakeholders in response to the 2023 public inquiry.

The Copyright Office points out that US Copyright Laws have adapted to many new types of technology before without the need to re-write or change the underlying laws. For example, in 1965, the Office issued a report regarding the use of computers in assisting with the creation of copyrightable works. U.S. Copyright Office, Sixty-eight Annual Report of the Register of Copyright for the Fiscal Year Ending June 30, 1965, (1966). At that time, the copyright code was not rewritten. Instead, the Copyright Office interpreted the code in view of the new computer technologies, and concluded the Office would determine copyright protectability in each situation based on whether a human

fulfills the traditional elements of authorship. *Id.*

The same analysis applies to AI, according to the Copyright Office. Where AI merely assists the author, its use will not impact copyright eligibility; however, a work entirely generated by AI will not have copyright protection. See, e.g. *Thaler v. Perlmutter*, 687 F. Supp. 3d at 149 (D.D.C. 2023). Therefore, the Copyright Office ultimately concludes there is no need for further legislation or special copyright protection for AI works.

Guidance on copyrightability of AI creative works under current copyright laws

The level of human creativity required for copyright protection is very low; however, it requires a human contribution more than facts or ideas. *Feist Publ'ns, Inc. v. Rural el. Serv. Co.*, 499 U.S. 340, 344-45 (1991). Furthermore, to achieve copyright protection, it is well established that any creative work must have some element(s) of human creativity to satisfy the human authorship requirement. *Cmtty. for Creative Non-Violence v. Reid* ("CCNV"), 490 U.S. 730, 737 (1989). For example, the Ninth Circuit has held that spiritual beings and monkeys have fallen short of this requirement. *Urantia Found.*

v. Kristen Maaherra, 114 F.3d 955, 957–59 (9th Cir. 1997)) (holding “it is not creations of divine beings that the copyright laws were intended to protect”); *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018)) (“[Monkey] is not an ‘author’ within the meaning of the Copyright Act”), *aff’d*, 888 F.3d 418 (9th Cir. 2018).

In its simplest form, AI systems generate **output** based on **input** which can be text, images, audio, video, or a combination. These inputs include prompts that allow a person to describe the theme, subject, or other component. The human user or “author” can continue to refine their prompts to get closer to a desired output. Robert Clariso & Jordi Cabot, *Model-Driven Prompt Engineering*, IEEE XPLORE, 2023, at 48, DOI: 10.1109/MODELS58315.2023.00020; See also, e.g., *id.* at 47; Sander Schulhoff et al., *The Prompt Report: A Systematic Survey of Prompting Techniques* at 7, ARXIV (Dec. 30, 2024), <https://arxiv.org/abs/2406.06608>.

According to the Copyright Office’s report, whether any specific AI work rises to the requisite level of human authorship will be determined on a case-by-case basis. More specially, the Copyright Office report considers a copyright analysis of AI in three situations: (1) the prompts discussed above instructing AI systems to generate output, (2) extensive inputs that can be perceived in AI-generated outputs, and (3) modification or arrangement of AI-generated outputs.

With respect to the first situation, comments responding to the 2023 Notice of Inquiry had a mixed reaction to whether the specificity of prompts should influence copyright protection. Though a very specific prompt

could allow a human author extensive control over expressive elements, the human does not control how the AI processes the instructions. The Office concludes that providing individual input text prompts for a work does not rise to the level of human authorship unless the AI is simply being told to do a rote or mechanical transcription process of the individual’s expression. *Andrien*, 927 F.2d 132, 133 (3d Cir. 1991). As technology evolves to allow more control over output, the Office may revisit this concept.

Authors may also not attain copyright protection based on the time put into refining the prompts or adoption of AI work as, neither the effort it takes to refire a prompt to tailor the desired output, nor providing instruction and selecting an outcome is sufficient to attain copyright protection. See *Feist Publ’ns, Inc.* 499 U.S. 340 (1991).

The Office also agreed with many commenters’ concerns that prompts can produce multiple outputs based on the same prompt. The Kernochan Center specifically argued that an extension of copyright protection to these written prompts “‘comes uncomfortably close to conferring a copyright in a method of generating images (or other works),’ which would be prohibited under section 102(b)” of the copyright statute.”

In contrast, when a human inputs their own copyrightable work into an AI system, they will have authorship over some of the output. See, e.g. *Rose Enigma*, Copyright Reg No. VAu001528922 (Mar. 21, 2023). A work may also be protectable under copyright when AI is used to generate content that is then selectively arranged or modified when the selection and arrangement of the work as a whole or the modifications alone

would meet the standard for copyright protection. Again, the Office looks to whether the human contribution to the work alone would rise to the originality standard.

So, in conclusion, simply refining prompts and/or spending a significant amount of effort or time to reach a desired outcome is not sufficient human involvement for copyright protection. *Feist Publ’ns, Inc.* 499 U.S. 340 (1991). Where AI has been used merely as a brainstorming, transcription, or an editing tool, however, AI use will not impact the copyrightability of the work.

Ultimately, the Office concludes that there is no current need for legislation specifically protecting AI works as the existing copyright law is sufficient to govern these works and determine their protection on a case-by-case basis. The Office’s conclusions align closely with Korea, Japan, and the European Union (EU), which look, at least in part, to human contribution to the work.

The Copyright Office expects to issue a third (much-anticipated) report later in 2025 that will focus on the use of copyrighted materials to train AI models, licensing, and fair use.

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