

The COMPUTER & INTERNET *Lawyer*

Volume 42 ▲ Number 9 ▲ October 2025

Ronald L. Johnston, Arnold & Porter, Editor-in-Chief

When It Comes to Copyright Law, AI Is Like a Camera

By Randy M. Friedberg and Sanjana Pai

Even in its relatively nascent form, artificial intelligence, or AI, is already running headlong into multiple conflicts with existing copyright law. One or the other is going to have to blink, to change and adapt, and it's not going to be AI.

One of the existing conflicts is whether AI can be an author for the purposes of copyright law. The U.S. Copyright Office and relevant court decisions have taken a clear position: Any content created solely by AI is not copyrightable; human participation is required. A person may use AI as a tool to assist in the creative process so long as the person's contribution is substantial and sufficient to meet the requirements for copyright.

While the bar for a person's contribution is generally a very low one for most copyrightable work, the scope of contribution in connection with AI-generated works remains an unresolved issue. Some cases do discuss a standard, and most agree it is a circumstantial analysis that will vary by the specific facts. The issue, while novel

in its application, is not new, but the conflict between the law and technology has never been as staggeringly important or the chasm as large as it is today.

COPYRIGHT OFFICE CLARIFIES ITS PRACTICES FOR AI-GENERATED WORK

The Copyright Office issued a statement of policy¹ on March 16, 2023, to clarify its practices for examining and registering works that contain material generated by the use of AI technology.² This statement was prompted by the Copyright Office receiving registration applications naming AI technology as the author or co-author or involving AI-produced or AI-assisted content. The statement clarified that only content created by a human can be the subject of a copyright.

As the agency overseeing the copyright registration system, the Copyright Office has extensive experience in evaluating works submitted for registration that contain human authorship combined with uncopyrightable material, including material generated by or with the assistance of technology. It begins by asking "whether the 'work' is basically one of human authorship, with the computer [or other device] merely being

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an assisting instrument, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually conceived and executed not by man but by a machine.” In the case of works containing AI-generated material, the Copyright Office will consider whether the AI contributions are the result of “mechanical reproduction” or instead of an author’s “own original mental conception, to which [the author] gave visible form.” The answer will depend on the circumstances, particularly how the AI tool operates and how it was used to create the final work. This is necessarily a case-by-case inquiry.³

SUPREME COURT RULES COPYRIGHTABLE WORKS NEED HUMAN AUTHORSHIP

As far back as 1884, the U.S. Supreme Court weighed in on the issue of the need for human authorship in copyrightable works. The issue was whether using a camera to take a photo meant that the work was not created by a person and therefore not copyrightable. In *Burrow-Giles Lithographic v. Sarony*,⁴ a defendant who had made unauthorized copies of a photograph argued that photographs were not copyrightable because the image at issue was created by a camera and not by a person.

As far back as 1884, the U.S. Supreme Court weighed in on the issue of the need for human authorship in copyrightable works.

The Court disagreed, finding that the Copyright Clause of the U.S. Constitution permitted photographs to be copyrightable “so far as they are representatives of original intellectual conceptions of the author.” The Court defined “author” as the person “to whom anything owes its origin; originator; maker; one who completes a work of science or literature.” The decision repeatedly refers to such “authors” as humans.

D.C. CIRCUIT AFFIRMS AI CANNOT BE SOLE AUTHOR FOR COPYRIGHT PROTECTION

Fast-forward 140 years and the holding still stands, but now the issue is whether a work created by AI can be the subject of copyright. Stephen Thaler, a computer scientist, developed a generative AI system called the

Device for the Autonomous Bootstrapping of Unified Sentience (DABUS), also known as the “Creativity Machine.” He used his Creativity Machine to create a graphic image called “A Recent Entrance to Paradise,” which he then sought to register with the Copyright Office. In the registration application, he identified the Creativity Machine as the author of the work. The Copyright Office rejected the application because the image was not created by a human being. The U.S. District Court for the District of Columbia upheld the denial, and Thaler appealed.

In *Thaler v. Perlmutter*,⁵ the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court’s refusal to allow registration, ruling in a unanimous decision that, consistent with *Burrow-Giles*, human authorship is a statutory requirement for registration. The circuit court clarified, among other things, that: (1) while the human authorship requirement does not fully prohibit copyright protection to works made by or with AI assistance, entirely autonomous authorship in the principal case is not copyrightable, and (2) whether a work made with AI can be registered depends on the specific situation, particularly how the AI tool operates and how much it was used to create the final work.

For works created with authorship by both humans and AI technology, the Copyright Office, aligned with its 2023 statement of policy, has allowed certain elements of artistic works to have copyright protection, while leaving other elements unprotected. For example, in reviewing a registration application for a graphic novel containing human-authored texts with AI-generated images, the Copyright Office determined that the combined work of both human and AI constituted copyrightable work; however, the individual AI-generated images themselves could not be protected.⁶

MORE GUIDANCE NEEDED ON SCOPE OF HUMAN INVOLVEMENT REQUIRED FOR COPYRIGHTABLE WORKS

In general, a string of recent rulings from the Copyright Office concerning AI-human works have allowed copyright registration as to the human-created portions of such works. This makes sense for a number of policy reasons and is consistent with existing precedent. Copyright law is intended to benefit the public by incentivizing authors; it is not meant, ultimately, to benefit authors. However, as AI tools become ever more ingrained in the day-to-day world of creators, it is likely that the line between human and AI creations will become ever more blurred.

While the Copyright Office has already issued guidance that prompts alone do not constitute sufficient human involvement or input to render the AI-generated output a copyrightable work, the scope of human involvement that is required remains unresolved.

AI is clearly a machine that intervenes between a human and a creation, like a camera, but unlike a camera, more sophisticated and nuanced guidance is going to be required for future copyright analyses.

KEY TAKEAWAYS

- Under current copyright law, content created solely by AI cannot be copyrighted.
- Copyright decisions for works created with authorship by both humans and AI require case-by-case analyses.

- For a work to be copyrighted, the scope of human involvement required in AI-generated works remains unresolved.

Notes

1. <https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright-registration-guidance-works-containing-material-generated-by-artificial-intelligence>.
2. 37 CFR Part 202.
3. 37 CFR Part 202 (footnotes omitted).
4. 111 U.S. 53 (1884), <https://supreme.justia.com/cases/federal/us/111/53/>.
5. 687 F. Supp. 3d 140, 142 (D.D.C. 2023), <https://media.cadc.uscourts.gov/opinions/docs/2025/03/23-5233.pdf>.
6. “Zarya of the Dawn” (Registration # V Au001480196) (2023), <https://www.copyright.gov/docs/zarya-of-the-dawn.pdf>.

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Number 9, pages 3–4 with permission from Wolters Kluwer, New York, NY,
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