



Are you rushing to copyright your ChatGPT-generated Screenplay? Don't get your hopes up. U.S. Copyright Office Publishes New Guidance on Works Created with Artificial Intelligence.

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The U.S. Copyright Office (the "Office") receives about half a million applications annually. These applications generally register literary works, photographs, and other visual performative and digital content. Recently, the Office recognized that it was receiving a growing number of applications wherein the "writing" was created, at least in part, by generative artificial intelligence ("AI"). Some applications disclosed, in detail, how the author used AI, and some did not. As a result, on March 16, 2023, the Office issued Copyright Guidance in the Federal Register entitled "Works Containing Material Generated by Artificial Intelligence."¹



Copyright Protection Excludes Work Authored by Non-Humans

For a work to be copyrightable, "it must owe its origin to a human being."² The Office "will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author."³ The Office applies these rules on a sliding scale. The more human agency is involved in the creative process, the more likely a product, even those created by a mechanical process, is copyrightable. Photography is an excellent example of copyrightable material that combines the automated process of creating the photo with creative elements of human authorship.

¹ U.S. Copyright Office, Library of Congress, "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence," <https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf>, Statement of Policy, effective March 16, 2023, (Last visited, April 13, 2023).

² See id., at pg. 16192, fn. 21.

³ See id.



Generative AI is a different story. Generative AI's ability to create new content indistinguishable from human-created content, with only the use of a prompt from the user, would likely result in the Office declining to register it. For example, if you asked ChatGPT to "write a screenplay about writing a blog in the style of Quentin Tarantino," ChatGPT would decide all of the expressive elements and generate the screenplay. In this instance, ChatGPT's script would not include any human input, creativity, or expression; because of that, it would not be eligible for copyright protection.

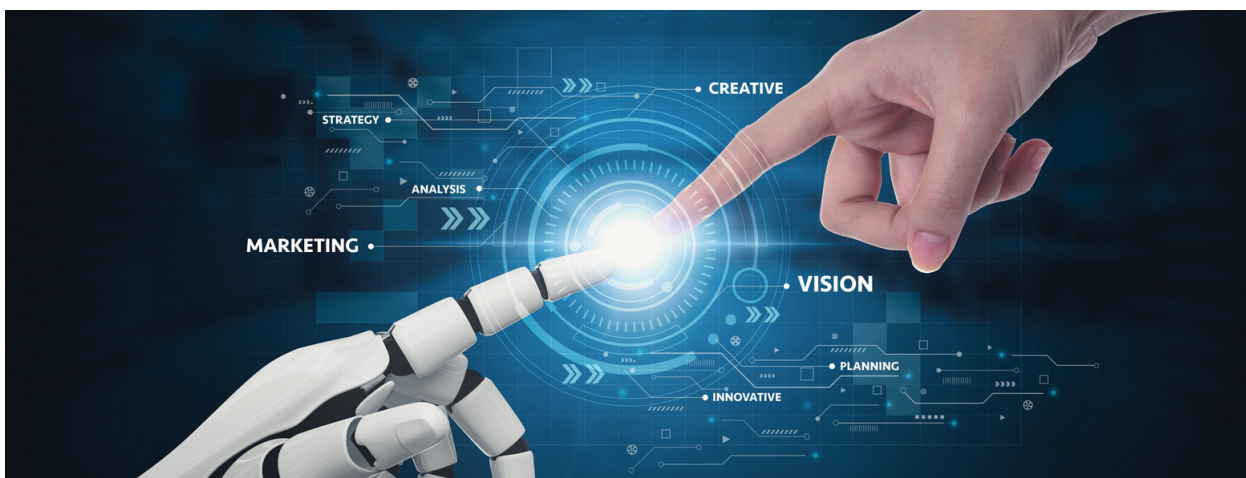


A Case-by-Case Approach to AI-Generate Materials

In its wisdom and experience, the Office is preparing for grey areas. Its initial inquiry will consider whether the work is created by a human, with the generative AI acting merely as assisting instrument, or whether the traditional creative elements were conceived and executed by generative AI. Critical parts of this case-by-case inquiry depend on how the AI tool was used is in use and how it operates.

The Office provides applicable scenarios that support a copyright claim even when the application includes generative or other types of AI. A collaboration of AI-generated material arranged by a human could support a copyright claim for the collaborative work. AI-generated material that a human has sufficiently modified could also obtain such protection. The scale slides further in favor of copyright protection as more people use generative AI as a tool to help them create without losing creative control.

This analysis also applies to infringement claims for AI-generated works that are derivative of pre-existing copyrighted works. Infringement cases will also be assessed on a case-by-case basis, considering the new creation's human input, creativity, and originality. As long as sufficient human authorship is involved, the copyright owner of an AI-generated work will be the person or entity that lawfully commissioned or licensed the creation of the work.



Copyright Applications must disclose whether the application includes AI-generated material and the extent of its use.

The Office continues to require applicants to use the Standard Application but clarifies their disclosure obligations for new and previously submitted applications containing AI-generated content. Applicants must disclose if a work submitted for application includes AI-generated content and briefly describe the human author's contributions. Where AI-generated content is more than de minimus, the application should identify an exclusion from the registration. It should provide a brief description of the AI-generated content. Where you are uncertain how to fill out the application, the guidance provides that "the application may simply provide a general statement that a work contains AI-generated material." The Office will contact the applicant during the review process.⁴

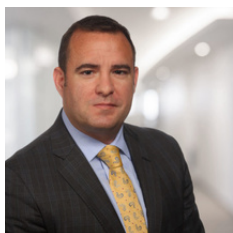
Suppose you already submitted an application or have a pending application that utilized AI-generated material but has yet to disclose its use. In that case, you must take steps to correct your application. The guidance suggests that applicants in this situation should contact the Copyright Office's Public Information Office and report the omission of AI-generated material. Suppose the Office has already processed your application and issued a registration in which you have yet to disclose the use of AI-generated material. In that case, the Office suggests the applicant submit an additional registration to correct the public record. Please update the application or registration to avoid the Office taking steps to cancel the registration.

⁴ Id. at 16193.



There is more to come from the Copyright Office.

In addition to the guidance, the Office has started an agency-wide initiative to examine various copyright issues related to several forms of AI, including generative AI. Later this year, the Office intends to issue a notice of inquiry seeking public input into several areas, including how the law should apply to using copyrighted works in AI training and the resulting treatment of outputs. Whatever the result, the importance of human authorship and creativity as the basis for copyright protection should remain unchanged. It should be one of the main areas of concentration when deciding whether your work is worthy of copyright protection.



About the Author

For more than twenty years, **Richard L. Hathaway** has litigated non-competition, non-solicitation, trade secrets, and other matters protecting business innovation and intellectual property. He has successfully enforced his business clients' agreements and rights in Texas state or federal court and arbitration. He has recently obtained a multi-million dollar arbitration award for a business against a former employee for misappropriating trade secrets. He and his team can assist your company in protecting its trade secrets via a policy and training review or aggressively pursuing available legal avenues. He is available via email at: Rhathaway@krcl.com and phone at: 214-777-4270.