

Cantor Colburn Client Alert: The US Copyright Office Issues Policy Statement On Examination and Registration of Works Containing AI-Generated Material

Summary

On March 16, 2023, the United States Copyright Office (“USCO”) issued a Statement of Policy titled “Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence” (88 Fed. Reg. 16190 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202))(hereafter the “Statement”). The Statement was released to clarify the USCO’s practices for examining and registering works that contain material generated using Artificial Intelligence (“AI”) technology. The Statement, summarized below, can be accessed online at [2023-05321.pdf \(govinfo.gov\)](https://www.govinfo.gov/records/2023-05321.pdf).

USCO’s Application of the Human Authorship Requirement to AI-Generated Works

Despite the increasing number of copyright applications containing AI-generated work, the Statement makes clear that all copyright applications must satisfy the human authorship requirement with no exceptions. Relying on the Supreme Court’s decision in *Burrow-Giles Lithographic Co. v. Sarony* (111 U.S. 53, 60 (1884)), the USCO indicates in the Statement that it “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.’” As indicated in the Statement, “[t]he answer will depend on the circumstances, particularly how the AI tool operates and how it was used to create the final work.”

A. AI-Generated Works

According to the Statement, “[b]ased on the [USCO’s] understanding of the generative AI technologies currently available, users do not exercise ultimate creative control over how such systems interpret prompts and generate material.” Thus, “if a work’s traditional elements of authorship were produced by a machine, the work lacks human authorship and the [USCO] will not register it.”

An example that may be familiar to our clients and colleagues is Cantor Colburn’s 2022 AI-generated Holiday Greeting, below:



Last year, members of our Cantor Colburn team used AI to create art by responding to a prompt which AI then used to generate brand-new images. Although the images were new and original works, the USCO would consider them as uncopyrightable under the new policy. Because the AI technology only received a prompt from a human, the visual work produced in response to the prompt is considered as being determined and executed by the technology, not by the human user. As a result, the AI-generated art created for the Cantor Colburn Holiday Greeting would not meet the “traditional elements of authorship” required for copyright registration.

B. Works Containing AI-Generated Materials

However, as the statement points out, there are circumstances in which “a work containing AI-generated material will also contain sufficient human authorship to support a copyright claim.” Relying on the Copyright Statute, the Statement further indicates that, “an AI-generated work would be eligible for copyright registration if AI-generated material is selected or arranged in a sufficiently creative way that “the resulting work as a whole constitutes an original work of authorship.”

For example, if all the AI-generated art from Cantor Colburn’s 2022 Holiday Greeting were re-arranged by a person in a sufficiently creative way, the combination of all the images may be eligible for copyright registration as a compilation. The AI-generated material in the compilation, however, will not be protected outside of the compilation.

What This Means to You – Guidance for Copyright Applicants

While technological tools can be part of the creative process, the Statement helps to clarify the conditions by which AI-generated works will be considered copyrightable.

If you are considering submitting a work containing AI-generated materials for copyright registration, keep the following points in mind:

- 1. Disclose the Inclusion of AI-Generated Material.** Applicants should always disclose the inclusion of AI-generated content in a work submitted for registration and provide a brief explanation of the human author’s contributions to the work.
- 2. Only Claim Human-Authored Portions of the Work.** Do not list AI technology or the company that provided the AI technology as an author or co-author simply because the AI technology was used when creating a work. Instead, applicants should use the “Author Created” field found in the standard copyright application to describe those portions of the work that were created by a human (i.e., as identified in the Statement, “Selection, coordination, and arrangement of [describe human-authored content] created by the author and [describe AI content] generated by artificial intelligence.”).
- 3. Exclude *De Minimis* Content.** AI-generated content that is more than *de minimis* should be excluded from the application. To exclude such content, Applicants should use the “Limitation of the Claim” section in the “Other” field, under the “Material Excluded” heading to provide a brief description of the AI-generated content (i.e., as also identified in the Statement, “[description of content] generated by artificial intelligence”). The Statement indicates that additional information may be provided in the “Note to CO” field in the Standard Application.



If you have already submitted a copyright application for a work containing AI-generated material and did not disclose the inclusion of AI-generated material, the following actions should be taken:

- 1. Pending Copyright Applications.** Applicants who have submitted a copyright application and did not disclose that the work contained AI-generated material should contact the USCO's Public Information Office to report the omission. To reach the Public Information Office, visit <https://copyright.gov/help/> or call (202) 707-3000 or (877) 476-0778.
- 2. Registered Copyrights.** For applications that have already been processed and resulted in a registration, the applicant should correct the public record by submitting a supplementary registration. In the supplementary registration, the applicant should describe the original material that the human author contributed in the "Author Created" field, disclaim the AI-generated material in the "Material Excluded/Other" field, and complete the "New Material Added/Other" field. So long as sufficient human authorship remains after the disclaimer is made, the USCO will issue a new supplementary registration certificate that includes a disclaimer addressing the AI-generated material.

For Further Information and Assistance

Attorneys in Cantor Colburn's [Trademark & Copyright Practice](#) and [Artificial Intelligence Practice Group](#) have substantial experience representing clients in these types of matters. Primary contacts are:

- Michelle Ciotola, Partner and Trademark & Copyright Chair, mciotola@cantorcolburn.com
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Please do not hesitate to contact us or your Cantor Colburn attorney with any questions you may have regarding this matter and your IP in general.

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Please note that each situation has its own unique circumstances and ramifications. This Client Alert is for informational purposes only and is not legal advice.