



Statement of

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before the

HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

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The Copyright Alliance, on behalf of our membership, submits this statement for the record concerning the hearing titled *Artificial Intelligence and Intellectual Property: Part III – IP Protection for AI-Assisted Inventions and Creative Works* before the House Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet, on April 10, 2024.

We write today to thank the Subcommittee for holding this hearing and for its attention to the significant copyright implications surrounding the development and use of generative artificial intelligence. As the only organization in the United States representing the entire creative community on copyright law issues, we stand ready to assist your efforts to ensure the concerns of America’s creators and copyright owners are effectively addressed. The Copyright Alliance is a non-profit, non-partisan public interest and educational organization that is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights

of creators and innovators. We represent the copyright interests of over 2 million individual creators, including established authors and artists, performers and photographers, and software coders and songwriters, as well as a new generation of creators. Some of these creators are career professionals, while others are hobbyists. Some have years of experience, while others are just embarking on their burgeoning careers. Some are critically acclaimed, while others toil in relative obscurity or have limited audiences. Perhaps most importantly for the purposes of this hearing, some of these creators are long-time users of AI, while others are just beginning to use these tools.

We also represent the copyright interests of over 15,000 organizations in the United States, across the spectrum of copyright disciplines. These include motion picture and television studios, record labels, music publishers, book and journal publishers, newspaper and magazine publishers, video game companies, software and technology companies, visual media companies, sports leagues, radio and television broadcasters, database companies, standard development organizations and many more. Importantly, these also include companies that have developed their own AI tools,¹ companies that have been using AI in some form for many years, and companies that have just begun exploring how to use generative AI. Each of these organizations comes to the Copyright Alliance with somewhat different experiences, views, and interests. Regardless of how their approaches to AI may differ, they all fall under the Copyright Alliance umbrella for a reason—their strong support for the value and importance of copyright and protecting the rights of human creators and copyright owners.

All Copyright Alliance members—whether they are an individual creator or an organization, whether they are big or small, or whether they are more traditional creators/copyright owners or a new generation of creators/copyright owners—share two things in common: (1) they rely on copyright law to protect their creativity, efforts, and investments in the creation, reproduction, distribution and adaptation of copyrighted works for the public to enjoy, and (2) they are interested in and concerned about copyright-related issues raised by generative AI. During its almost 17-year history, other than online piracy, no copyright issue has drawn more interest

¹ For example, some of our members (or members of members) who are both creators/copyright owners and also developers of generative AI foundational models, include Adobe, Oracle, and Getty.

from the Copyright Alliance membership than generative AI.

One copyright issue related to AI that has drawn much interest from our membership is the copyrightability of works that are created, in whole or in part, using generative artificial intelligence (GAI). We would like to address three important issues related to copyrightability:

1. Established Copyrightability Standards are Capable of Addressing AI-Generated Material

The factors for determining copyrightability have been well developed and articulated throughout copyright law jurisprudence and continue to be applicable to new technologies. The question of copyrightability must be determined on a case-by-case basis, based on the particular facts at issue. In *Feist Publications v. Rural Telephone*, the Supreme Court explained that a work of authorship must possess “at least some minimal degree of creativity” to sustain a copyright claim.² And in *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court noted that the question of copyrightability is to be determined based on “the existence of those facts of originality, of intellectual production, of thought, and conception on the part of the author.”³ Finally, in *Thaler v. Perlmutter*, the district court reiterated that copyright only protects the unique value of human creativity, noting that courts have “uniformly declined to recognize copyright in works created absent any human involvement”.⁴

In determining whether a work generated using AI is copyrightable, these longstanding standards of copyrightability will apply no differently than they do in other contexts. Therefore, it is our view that revisions to the Copyright Act are not necessary to clarify the human authorship requirement, especially in view of the recent decision of the U.S. District Court for the District of

² *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991).

³ *Burrow-Giles Lithographic Company v. Sarony*, 111 U.S. 53, 59-60 (1884).

⁴ See *Thaler v. Perlmutter*, No. 22-1564, 2023 U.S. Dist. LEXIS 145823, at *15–17 (D.D.C. Aug. 18, 2023) (citing, among other cases, *Urantia Found. v. Maaherra*, 114 F.3d 955, 958–59 (9th Cir. 1997); *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 304–06 (7th Cir. 2011); *Naruto v. Slater*, 888 F.3d 418, 420 (9th Cir. 2018)).

Columbia in *Thaler v. Perlmutter* granting the U.S. Copyright Office’s motion for summary judgment and confirming that “human authorship is an essential part of a valid copyright claim” and “a bedrock requirement of copyright.”⁵ When material is wholly generated by AI and there is no human authorship involved, as was the case in *Thaler*, that material should not be protected by copyright. The Copyright Office and at least one court are in agreement here, and thus no change to the Copyright Act on these issues is warranted.

2. Works Wholly Generated by AI Should Not be Protected by Copyright

The Copyright Clause of the Constitution grants Congress the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” We do not believe the Clause can be interpreted to support the claim that the Constitution permits copyright protection for non-humans. Central to the Copyright Clause is the concept of creator incentivization, which is not applicable to machines that do not need or comprehend incentivization. As the U.S. District Court for the District of Columbia recently explained in *Thaler v. Perlmutter*: “The act of human creation—and how to best encourage human individuals to engage in that creation, and thereby promote science and the useful arts—was thus central to American copyright from its very inception. Non-human actors need no incentivization with the promise of exclusive rights under United States law, and copyright was therefore not designed to reach them.”⁶

The court’s opinion adopts the Copyright Office’s position (responding to Thaler’s complaint) that “the Constitutional purpose of copyright is to incentivize *humans* to create expressive works” and that “human creativity is the *sine qua non* at the core of copyrightability, even as that human creativity is channeled through new tools or into new media.”⁷ Both the Copyright Office and District Court explain that the history and language of the Copyright Act, Supreme Court precedent, and the Copyright Office Compendium support the position that only human

⁵ *Thaler*, at *2.

⁶ *Thaler v. Perlmutter*, No. 22-1564, 2023 U.S. Dist. LEXIS 145823, at *13 (D.C. Cir. 2023).

⁷ *Id.* at *8.

authorship qualifies for copyright protection.⁸

While AI tools have the potential to assist human creativity, much like other creative tools that have come before them, copyright protection for *wholly* AI-generated material is *not* desirable as a policy matter. Wholly generated AI material that is based on copyrighted works ingested by AI developers without compensating the creator or obtaining their permission to ingest their works has the potential to supplant the market for the ingested works. Policymakers should be discouraging such activities, not incentivizing them by granting legal protection to material manufactured wholly outside of the realm of human authorship.

The pace of AI development demonstrates that there are already adequate incentives in place. Today, there exist a large number of AI developers and systems.⁹ That number has grown exponentially over the past year and is likely to continue to increase in the coming months and years. Similarly, the number of AI users and customers has also expanded significantly.¹⁰ It is abundantly clear that no additional copyright-related incentives are needed to encourage AI developers and systems to enter the marketplace and prospering.

3. Comments on the U.S. Copyright Office Registration Guidance

About a year ago, the Copyright Office issued guidance on the registration of works that contain AI-generated elements titled *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*.¹¹ In the guidance, the Office explains that applicants have a duty to disclose the inclusion of AI-generated content in a work submitted

⁸ See e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (limiting copyright law to protecting only the creations of human authors); *Mazer v. Stein*, 347 U.S. 201, 214 (1954) (holding that a work “must be original, that is, the author’s tangible expression of his ideas”); *Goldstein v. California*, 412 U.S. 546 (1973) (defining “author” as “an ‘originator’” and “he to whom anything owes its origin”).

⁹ See Mark Webster, *149 AI Statistics: The Present and Future of AI At Your Fingertips*, AUTHORITYHACKER (Oct. 6, 2023), <https://www.authorityhacker.com/ai-statistics/>.

¹⁰ See *id.*

¹¹ See generally *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, 88 Fed. Reg. 16190, 16190–94 (Mar. 16, 2023), https://www.copyright.gov/ai/ai_policy_guidance.pdf?loclr=eanco.

for registration and to provide an explanation of the human author’s contributions to the work.¹² Other notable requirements are that for AI-generated content, registrants must use the standard application, and in a situation where registration has already been granted (but AI-generated content was not disclosed), the applicant should correct the public record by submitting a supplementary registration.¹³

We appreciate the Copyright Office’s effort to provide much-needed guidance on the complex issues surrounding the copyrightability of works that contain AI generated elements, but there remain many unanswered questions and some confusion on how the standards set forth in the guidance will be applied in practice. In particular, we believe it is not a good use of Copyright Office resources to engage in investigations into the boundaries of what is disclaimed as AI-generated and whether there is sufficient human involvement in each case. Nor should the Office make inquiries into whether there are AI-generated elements in a work when there is no indication of such by the applicant on the registration form. The Copyright Office, as it does for disclaimed pre-existing works incorporated in a new work, should at most merely require the applicant to generally disclose that the work incorporates materials wholly generated by AI and identify the nature of that material in the registration application.¹⁴

There are a number of inconsistencies between the guidance and parts of the Copyright Office Compendium on registration guidelines that must be clarified. One example is that the Compendium says that unclaimable material should be disclaimed when it represents an “appreciable portion” of the whole work, whereas the guidance says that AI-generated content that is more than *de minimis* should be explicitly excluded from the application. These are two different standards that must be reconciled. In a webinar held to clarify its guidance, the Office attempted to define what it meant by *de minimis* and described how it compared to “appreciable amount,” but in the process raised additional questions, which we look forward to working with

¹² *Id.* at 16193.

¹³ *Id.*

¹⁴ *See id.*

the Office on clarifying.¹⁵

Use of the *de minimis* standard to separate material that should be disclaimed from material that should not be is not only confusing but also, we believe, an inappropriate standard. The term “more than *de minimis*” is used in other contexts in the law where it does not involve a standard of separable copyrightability. Specifically, in the context of joint authorship, a more than *de minimis* contribution may suffice to constitute joint authorship while not rising to the level of independent copyright protection.¹⁶ Further, whether a portion of a work used without authorization is “more than *de minimis*” may have different implications in an infringement analysis. Because the *de minimis* standard varies in different contexts, we recommend that the Office not use the term as the standard for determining when it is necessary to disclaim material in a registration application. Instead, we recommend that the Office’s guidance confirm the standard articulated in section 621.2 of the Compendium, which explains that “[u]nclaimable material should be disclaimed only if it represents an appreciable portion of the work as a whole.”¹⁷

There is also confusion amongst many in the copyright community about how material generated in part using AI should be disclosed in a registration application. The guidance applies obligations to disclose AI-generated material included in works without drawing a clear line around what those are. It would be helpful to have further written guidance and clarification of these registration issues.

The guidance also includes the requirement that registrants must use the standard application when registering a work with AI-generated content, which raises the following concerns for creators and copyright owners:

¹⁵ *Webinar: Registration Guidance for Works Containing AI-Generated Content*, U.S. COPYRIGHT OFF. (June 28, 2023), <https://www.copyright.gov/events/ai-application-process/>.

¹⁶ 1 NIMMER ON COPYRIGHT § 6.07[A][1] (2023) (citing *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640 (S.D.N.Y. 1970), *aff’d on other grounds*, [457 F.2d 1213 \(2d Cir. 1972\)](#)).

¹⁷ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 621.2 (3d ed. 2021).

- It prohibits the use of group registrations and the benefits that flow from them, making it more challenging and economically infeasible for certain creators to register their works with the Office.¹⁸ The Copyright Office should amend its guidance to permit group registrations in this context.
- When a registrant used a form other than the standard form in the past to register the AI-assisted work but now needs to go back and revise their registration to disclaim AI-generated content, there are many unanswered questions surrounding how they would do so and what the consequences would be. Specifically, it's unclear what effect a change in forms would have on the effective date of registration if a group registration was broken up into many standard forms. It would be helpful to have further guidance here.

Lastly, there is significant concern amongst many in the copyright community about retroactive application of the Copyright Office's guidance. For creators and organizations with a vast portfolio of registrations, the threat of invalidation or cancellation is a major concern, especially when the guidance on where to draw the line regarding what to disclaim is unclear. Specific concerns include: (i) whether and, if so, how the U.S. Copyright Office will go back and revoke applications that did not accurately disclose AI use; (ii) whether the new guidance will be misused by overly aggressive litigators to challenge the validity of every copyright registration if they believe AI was used even slightly and was not disclosed—in turn this might make litigation more expensive; and (iii) the cost of registration is expensive for many individual artists, and the confusion of registering works that incorporate AI created by the guidance will be discouraging for artists and become a barrier to registration.

We are encouraged by the fact that the Copyright Office recently indicated in a letter to Congress outlining its next steps addressing issues raised by AI that it will soon publish an update to the Compendium of U.S. Copyright Office Practices. According to the letter, the

¹⁸ Many individual creators are not policy or legal experts and may fail to realize that works with AI elements cannot be registered in a group registration application. This means that if they unknowingly choose the group registration option, they are inevitably set up for failure as they will be unaware of disclosure requirements which leads to sunk costs of time and resources spent in the registration process in addition to the Office's invalidation of the registration application.

update will include further guidance and examples relating to the registration of works incorporating AI-generated material and will be subject to a notice-and-public comment process. We look forward to commenting on that guidance and otherwise engaging with the Copyright Office as it continues to study and address AI-related issues.

Conclusion

We once again thank the Subcommittee for holding this hearing and for its attention to the significant implications surrounding the development and use of generative AI. The Copyright Alliance and our members stand ready to assist the Subcommittee as it examines copyright protection for AI-assisted creative works, and we look forward to working with Congress, the Copyright Office, and other stakeholders on these issues in the future.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Kupferschmid', with a long horizontal flourish extending to the right.

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