

LEGAL INSIGHTS: AI-GENERATED CONTENT IN THE DIGITAL AGE

Throughout the course of human history, mankind has always used tools. From the sticks and stones fashioned by our early human ancestors to the cutting-edge technology available to us today, we are no strangers to wielding tools. Unfortunately, it appears that we have evolved from wielding tools to relying wholly on technology, to the point where there are instances where we have done away with human ingenuity and creativity.

This is especially so with the use of generative artificial intelligence (“AI”) these days. In a world where time is money and companies are cutting costs, reducing head count and using AI to generate content does appear to be an attractive cost-saving measure. However, such usage of AI must be carefully considered.

There is an increasing need to ensure that the use of AI in any commercial activity is carefully monitored. Many content creators take it for granted that copyright arises automatically when a work that qualifies for protection is created. However, many fail to realise that the requirement of originality in the work means that it needs to be the fruit of an author's own intellectual creation. Creators fail to remember that they need to have made some creative choices to put their own 'personal stamp' on the work. The present discourse around AI-generated content indicates that the use of AI to generate the work will not entitle them to claim that the work is “original”.

CNN reported in 2023 that *“Sports Illustrated publisher fires CEO after AI debacle”, a move that “came after an embarrassing debacle in which Sports Illustrated was caught publishing stories with fake author names and profile photos generated by artificial intelligence.”*

AI generated articles by fake online personas would likely mean that Sports Illustrated enjoyed zero copyright protection from all the stories generated by the AI and the fake online personas (unless they had human individuals in place to edit and place their own “personal stamp” on the work), as

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all AI content and works created solely by AI are considered authorless work and cannot be copyrighted. This is the stand taken by the U.S. Copyright Office and the stand is mirrored in many other jurisdictions.

It is interesting to note that the U.S. Copyright Office had, in September 2023, rejected copyright protection for art created using AI, denying a request by artist Jason M. Allen for copyright covering an award-winning image he created with the use of the generative AI system 'Midjourney', explaining that Allen's science-fiction themed image "Theatre D'opera Spatial" was not entitled to copyright protection because it was not the product of human authorship. This is despite the effort that Allen made by inputting numerous revisions and text prompts at least 624 times to arrive at the initial version of the image. [*Copyright Review Board of the U.S. Copyright Office document titled "Second Request for Reconsideration for Refusal to Register Théâtre D'opéra Spatial (SR # 1-11743923581; Correspondence ID: 1-5T5320R)"*]

In juxtaposition, the Beijing Internet Court in November 2023 ruled that AI-generated content can enjoy protection under copyright law holding, *"as long as an AI-generated image reflects the original intellectual investment of a human being, it should be considered a work that is protected by copyright laws"*. It is interesting to note that in direct contrast to Allen's 624 prompts, the court placed great emphasis on the notion that the plaintiff *"made a certain degree of intellectual investment"* in selecting and arranging the inputs (i.e., a series of creative prompts and parameters that generative AI users feed into the AI system to facilitate an output based upon such inputs). According to the court, the plaintiff-selected inputs were sufficiently original; thus, the output (i.e., the AI-generated image) met the criteria of *"intellectual achievements"* as well as the originality thresholds necessary to enjoy copyright protection. [*Beijing Internet Court case of Li Yunkai v Liu Yuanchun*]

Regardless of the 2 contrasting decisions and the ensuing questions that leave the legal fraternity and academia wondering as to the level of human involvement necessary for copyright protection of an expression, it is clear that when AI is no longer the tool that we use to give life to art, and instead becomes the creator of the art, we potentially enter a quagmire of confusion.

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One can only conclude that to be prudent and err on the side of caution – if you intend to use AI in your content, please ensure that the work is not solely created by AI and is uniquely yours with human involvement being applied throughout. It would be prudent to also ensure that there is sufficient evidence to document the underlying creative/intellectual process that is unique to you.

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