

## 3 Takeaways From The Copyright Office's AI Webinar

Authored by Leo Loughlin, Jennifer Maisel, and Davide Schiavetti  
for Law360  
Article  
6.30.23

The startlingly fast developments in generative artificial intelligence technology over the last few years have caused numerous questions and issues to be raised about the protection and registrability of copyrighted works containing GAI material.

On June 28, the U.S. Copyright Office's put on a webinar addressing its March guidance, "Registration Guidance: Works Containing Material Generated by Artificial Intelligence," to provide a clearer view of the Copyright Office's procedures for works containing GAI and walk through several examples as to when and how applicants should disclose excluded GAI content under the guidance.

Because there are only a small number of cases addressing the use of GAI, the Copyright Office noted it was important to provide further guidance to the legal community for the treatment of these works.

In fact, the Copyright Office only highlighted two registration decisions — one for "The Creativity Machine," where the applicant identified a nonhuman author as creating all elements of the work, and one for "Zarya of the Dawn," where the applicant arranged GAI images along with other content in a comic book.

Below are three key takeaways from the webinar.

### 1. The Duty to Disclose GAI

Copyright applicants have an affirmative duty to disclose "excluded" elements created by GAI.

The obligation to disclose excluded elements rests on whether the GAI content in the work is appreciable or de minimis. The standard for ascertaining whether the GAI content is appreciable is: "Would that content be copyrightable if created by a human author?" If yes, then the GAI content is appreciable and the applicant should

### Key Contacts

Leo M. Loughlin

Jennifer B. Maisel

Davide F. Schiavetti

### Related Areas of Practice

Artificial Intelligence

Copyright Prosecution

### Technologies

Artificial Intelligence (AI) & Machine Learning (ML)

exclude the GAI content from the registration.

Likely in view of criticism as to how the Copyright Office released the guidance, the Copyright Office went to great lengths during the webinar to point out that this obligation is not a rule change and that the same principles apply to GAI as to other claimable or unclaimable material, including material that is (1) previously published, (2) previously registered, (3) public domain and/or (4) owned by a third party.

Bottom line: In any new applications, applicants are expected to tell the Copyright Office what is new and what is unclaimable.

Comparing all preexisting categories of unclaimable material, the new category of AI-generated has one evident difference: It cannot be independently verified. Publication, registration, ownership or public disclosure can be ascertained by consulting registers or simply performing online searches. However, whether a certain portion of a work has been AI-generated can be determined only if the entity that engaged the AI discloses such information.

While a failure to disclose GAI content will likely not invalidate a registration absent an intent to mislead or willful blindness, best practice under the current guidance is to exclude appreciable GAI content in new applications and supplement existing registrations as needed.

## 2. When to Exclude GAI Content

The Copyright Office provided several "illustrative examples" to distinguish de minimis from appreciable contributions of GAI.

Notably, the Copyright Office is currently evaluating ways to provide these or other illustrative examples to the public, and provided some useful benchmarks for when an applicant should exclude GAI content:

- If GAI is used for brainstorming ideas for books, texts or other copyrightable material, there is no need to disclose material as unclaimable because they are just ideas.
- Hybrid content: In an illustrated book it is possible to disclaim GAI artwork but claim only the text if created by humans, and vice versa.
- GAI assistance: If GAI assisted with spell check, grammar review, captions, headings, tables of contents, etc. of a work, such assistance is considered de minimis and does not have to be disclaimed.
- Using GAI to apply a human edit made to one frame in a video to other frames in the video is de minimis.
- Using GAI to generate background images is considered appreciable, whereas using GAI to remove personally identifiable information in film is de minimis.
- GAI isolating an unpublished song, removing background noise and converting audio to stereo is de minimis and does not require disclaiming.

While the illustrative examples provide greater predictability as to the Copyright Office's position on registration, questions remain in view of the broader legal uncertainties surrounding GAI works on issues such as how much human interaction with the GAI material is needed to make the content claimable and the contours of fair use and infringement.

Additionally, several of the illustrative examples may cast yet a thicker cloud over the protection of appropriation art, particularly following the U.S. Supreme Court's ruling earlier this year in *Andy Warhol Foundation for the Visual Arts Inc. v. Goldsmith*.

### 3. Litigation Implications

As a practical matter it may be very difficult for potential defendants to ascertain from a registration alone what material a potential copyright plaintiff contends is protected and excluded until well into litigation and discovery.

Only a brief, broad description of the excluded material is required for registration, and during the webinar the Copyright Office emphasized that it is appropriate to register the entire work with all protectable and nonprotectable elements.

Therefore, in preparation for potential litigation, applicants may want to have a practice of maintaining records identifying the protectable elements in a work and the contributions of human authors.

#### What's Next

The recording will be made available in about three weeks, and the Copyright Office is continuing to engage the public as part of its initiative to examine copyright law and policy issues raised by AI technology. The Copyright Office is also expected to issue a notice of inquiry addressing legal issues surrounding GAI later this year.

The illustrative examples in the webinar provided some needed clarity on some of the theoretical principles laid out in the March guidance. However, copyright protection applies to works that are very diverse in nature, and equally diverse is the type of assistance that GAI can offer.

Such diversity makes defining general principles challenging.

We expect that the guidance will continue to evolve as the Copyright Office and courts issue more decisions on GAI copyright issues to build a robust set of case studies.

In the meantime, and as highlighted in the "Zarya of the Dawn" decision and the illustrative examples, existing guidance counsels toward continuing to register works that contain GAI content and identifying the exclusion of solely GAI-generated content where appropriate.

This article was originally published in Law360's Expert Analysis section on June 30, 2023. Read more at: <https://www.law360.com/articles/1695194>.