Who Owns Creativity? — AI in Entertainment

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The use of artificial intelligence (AI) in the film and television industry in content creation raises many legal and business issues. One key issue is the ownership of the works generated using AI and the ability to register a copyright in such works. A new report from the Copyright Office provides some clarity on the requirement for human contribution to works and offers some opportunities for production companies and studios to: (i) craft policies on how AI is used in the creative processes of production, (ii) change processes with respect to title searches and other due diligence tasks in transactions, and (iii) update language in standard agreements with respect to the use of AI that will support the goal of obtaining copyright protection.

1. How Is AI Used in the Entertainment Industry?

AI is rapidly transforming the entertainment industry and has gained significant attention for its ability to produce text, images, and videos, raising both opportunities and concerns for Hollywood and beyond. One of the key ways AI is being integrated into entertainment is through scriptwriting and content development. AI-driven tools like ScriptBook analyze scripts to predict box office success and suggest improvements, while AI-generated narratives assist in the preliminary stages of story creation. Additionally, AI is increasingly used in casting, using tools such as Cinelytic, which assesses an actor's market value to forecast a film's financial viability. AI also plays a growing role in pre-production, with machine learning algorithms assisting with location scouting and optimizing scheduling.[1]

During production, AI plays a crucial role in streamlining visual effects and post-production processes. Research and development are ongoing on software that enables directors to tweak actors' expressions in post-production, and deepfake technology has been used for de-aging effects.[2] AI is also revolutionizing editing, with tools such as Adobe Sensei automating tasks like object removal and scene stabilization.

Beyond production, AI significantly impacts marketing and distribution. Streaming platforms use AI algorithms to personalize content recommendations based on viewing history, while AI-driven sentiment analysis helps studios tailor their promotional strategies. AI chatbots, such as the one used in marketing the horror film *Morgan*, enhance audience engagement through interactive experiences.[3]

Despite its benefits, AI also raises concerns. The technology threatens traditional industry roles, particularly for writers, editors, and visual artists, as automation reduces the need for human labor. The Writers Guild of America has expressed concerns over AI-generated content diminishing creative originality and undermining fair compensation for artists.[4] Additionally, ethical concerns surrounding deepfake misuse further complicate AI's

adoption.

Another major concern is the protection of intellectual property rights, especially copyrights. The U.S. Copyright Office has ruled works are not copyrightable unless there is sufficient human creativity involved.[5] This has led to legal disputes over the ownership of AI-assisted creative works. Furthermore, AI-generated digital replicas, which can mimic the voice or likeness of actors without their consent, have sparked debates over ethical and legal protections.[6] The Copyright Office has recommended federal legislation to regulate unauthorized digital replicas, addressing concerns about fraud, privacy violations, and misuse in political or commercial settings.[7]

2. What Is the New Guidance From the Copyright Office on AI and Copyrights?

In early 2023, the Copyright Office announced the launch of a broad AI Initiative and issued a statement of policy providing guidance on the registration of works incorporating AI-generated material reiterating the office's longstanding position that human authorship is an essential requirement for copyright protection in the United States.[8] The Copyright Office went on to clarify that if a work contains more than a *de minimis* amount of AI-generated material, the applicant for copyright registration should disclose that information and provide a brief statement describing the human author's contribution. Since that time, the Copyright Office has registered hundreds of works that incorporate AI-generated material, with the registration covering the human author's contribution to the work and disclaiming the AI-generated content.[9]

On January 29, Register of Copyrights and Director of the U.S. Copyright Office Shira Perlmutter published the second part of a planned three-part report on copyright and AI, this time focused on the question of copyrightability for AI-generated creative works. The first part, published in July 2024, explored the legality of so-called digital replicas of individuals' likenesses, or "deepfakes."

The report provides guidance and some concrete conclusions:

- The use of AI tools to assist rather than stand in for human creativity does not affect the availability of copyright protection for the output.

- Copyright protects the original expression in a work created by a human author, even if the work also includes AI-generated material.

- Whether human contributions to AI-generated outputs are sufficient to constitute authorship must be analyzed on a case-by-case basis.

- Human authors are entitled to copyright in their works of authorship that are perceptible in AI-generated outputs, as well as the creative selection, coordination, or arrangement of material in the outputs, or creative modifications of the outputs.

- Prompts alone do not provide sufficient human control to make generative AI users the author of an output for copyright purposes, at least given today's available technology (a significant caveat).

3. How Does the Copyright Office Guidance Apply to the Entertainment Industry?

The Copyright Office sought and received public comment from many organizations in the film, television, and music industries in preparing the report. Many commenters expressed concern about continuing the longstanding and growing use of computer-assisted tools in the creation process.[10] They pointed to various tasks that have been performed in creative fields for years, some of which now incorporate recent developments in AI, such as "aging" or "de-aging" actors, identifying chord progressions, and removing unwanted objects or crowds from a scene, and argued that using these types of AI should not affect the availability of copyright protection for the works created using these tools.[11] The conclusions contained in the report make it clear that the Copyright Office agrees that there is an important distinction between using AI as a tool to assist in the creation of works and using AI as a stand-in for human creativity.

Commenters were also concerned with situations where creators have begun to experiment with using AI as a brainstorming tool, such as tools used to structure or create an outline of a literary work or assist in ideation when writing a new song. Where the user is prompting a generative AI system and referencing, but not incorporating, the output in the development of her own work of authorship, the Copyright Office concludes that this should not affect the copyrightability of the resulting human-authored work.

The report specifically addresses the use of AI in filmmaking: "inclusion of elements of AI-generated content in a larger human-authored work does not affect the copyrightability of the larger human-authored work as a whole. For example, a film that includes AI-generated special effects or background artwork is copyrightable, even if the AI effects and artwork separately are not."[12]

4. What Legal Issues Does the Report Raise for the Entertainment Industry?

The two primary legal issues raised by the report and the Copyright Office's guidance for those in the entertainment industry are ownership and enforcement. While the Copyright Office and current law clearly state that copyright protects the original expression in a work created by a human author, even if the work includes AI-generated material, uncertainty remains: Compl., *Allen v. Perlmutter*, No. 1:24-cv-2665 (D. Colo. Sept. 26, 2024), Doc. No. 1. challenges the Copyright Office's refusal to register an AI-generated output and highlights the rapidly evolving technology.

The Copyright Office emphasizes that prompts alone do not constitute sufficient human control to establish ownership of AI-generated works. This conclusion is based on current technology, suggesting that as AI technology evolves, the ownership of works created in the entertainment industry may require case-by-case assessment.

Additionally, current Copyright Office guidance mandates applicants to disclose whether AI was used in the creation of a work and specify the extent of human contribution. This requirement presents several issues. First, the threshold for what constitutes "sufficient human input" remains ambiguous, leading to uncertainty for authors who use AI as a creative tool. If a work is deemed to lack adequate human authorship, it may be denied copyright protection entirely, leaving it vulnerable to unrestricted use. This raises questions about how studios, writers, and artists can claim ownership over AI-assisted content. For example, if a studio uses AI to generate a script, who owns the final product? If an AI system assists in editing or enhancing a film, does the producer retain full

ownership, or does the software provider share rights? These ambiguities create complications for work-for-hire agreements and employment contracts. Traditionally, copyright law has recognized employers as the owners of works created by employees under work-for-hire agreements, but if AI-generated content does not qualify for copyright protection, these standard contractual arrangements may need to be revisited.

The requirement to disclose AI use in the creation of works may lead to increased scrutiny during the registration process and could result in portions of the work being excluded from registration. It is unclear how this analysis will impact enforcement and whether the degree of AI involvement and the level of human control will become a strategy to defend against infringement.

Moreover, the disclosure requirement raises concerns about inconsistent enforcement. Many AI-assisted works may not be properly labeled, either due to misunderstanding or deliberate omission. Consequently, the Copyright Office may face an increased administrative burden in assessing registrations, leading to delays and potential disputes over ownership. These challenges complicate the ability of creators and studios to secure the legal protections necessary to monetize and control their work.

Proving infringement of AI-assisted content is further complicated by the fact that AI models are often trained on vast datasets that include copyrighted works. If an AI system generates an output that closely resembles an existing copyrighted work, it raises the question of whether such an output constitutes a fair use or infringement. The lack of clear legal precedents makes it difficult for those in the entertainment space to enforce their rights, creating uncertainty in the industry.

5. What Steps Can Legal Departments Take to Address These Issues?

There are steps that can be taken to create a stronger position for ownership and registration of works created using AI and to manage the risks with respect to acquisition and licensing of such works from third parties.

A. Track the use of AI in the creative process.

To establish ownership and prepare accurate applications for copyright registration, it is essential to establish a tracking system of the AI tools used and works entirely generated by AI. This may necessitate internal policies governing the use of AI, requiring disclosure of how AI was used, what elements of the work are entirely generated by AI, how those elements were accomplished (*i.e.*, level of human control), what inputs were used to train the AI tools employed, and whether any risk of third-party claims may arise from the use of such outputs. Restrictions on the use of certain AI tools may also be necessary.

A well-structured tracking system would include several key components including:

- **AI Usage Logs**: These logs would provide detailed records of AI's involvement in scriptwriting, video editing, CGI, voice generation, and other creative aspects, ensuring transparency and accountability in the creative process.

- **Version Control and Attribution**: This involves maintaining records of human contributions alongside AI-generated elements to demonstrate sufficient human authorship for copyright eligibility. By clearly delineating

the roles of human creators and AI tools, producers can provide stronger evidence of human authorship when registering works with the Copyright Office.

- **Metadata Tagging**: Embedding AI usage data in digital files can ensure transparency and assist in copyright registration and enforcement. This practice makes it easier to verify the originality of a work and reduces the risk of unintentional copyright infringement.

By implementing these measures, producers and content creators can better navigate the complexities of AI-generated content, ensuring that they maintain ownership and protect their creative works effectively.

B. Update due diligence requests when purchasing or licensing content.

The due diligence process to establish chain of title or licensing rights for acquisitions of content should be updated to reflect the novel issues raised by AI. First, it is essential to request detailed documentation on how AI was used in the creation of the works being acquired. This includes specifying the AI tools employed and the extent of their involvement in the creative process. Additionally, information on the level of human control and input in the creation of the works should be sought, including records of human contributions and oversight to ensure that the works meet the threshold for copyright eligibility.

Reviewing any third-party agreements related to the AI tools used in the creation of the works is important as well. This includes licenses, service agreements, and any other contracts that may affect the ownership or rights to the AI-generated content. Ensuring that the seller provides representations and warranties affirming that they have disclosed all AI usage and that they hold the necessary rights to grant licenses or sell the content is also necessary. This includes confirming that no third-party rights are infringed upon by the AI-generated elements.

C. Update Terms in Agreements

Standard agreements where ownership of copyright is central to the business terms, such as employment, contractor relationships, writer and composer agreements, content acquisition, and licenses of rights, should be updated to address the use of AI in creative works. These updates should include specific representations and warranties regarding AI content and usage, as well as mandatory disclosure of AI involvement. Key provisions to consider incorporating into these agreements include:

- **Indemnification**: Agreements should include specific indemnification clauses to protect against liabilities if an AI-generated work is found to infringe on a preexisting copyright or cannot be registered or enforced due to authorship issues.

- **Representations and Warranties**: Parties should be required to affirm that they have disclosed any use of AI in the creation of a work and that they hold the necessary rights to grant licenses or sell the content or that the work is not substantially generated through the use of AI. This ensures that all parties are aware of the extent of AI involvement and that proper rights are secured.

- **Actor and Creator Protections**: In addition to any requirements of SAG/AFTRA, DGA, WGA, and other collective bargaining agreements, deal memos should include explicit clauses governing digital replicas, synthetic voices, and AI-generated likenesses and use of AI in writing and editing processes. These clauses

should conform with internal policies and create clear expectations with respect to use of AI.

By updating standard agreements to include these provisions, businesses can better navigate the complexities of AI-generated content and ensure that all parties are adequately protected and informed.

Copyright and AI is an ever-evolving landscape of issues, especially for the creative industries. The Entertainment Group at Troutman Pepper Locke has the experience to assist you in navigating these issues.

[1] The AI Takeover In Cinema: How Movie Studios Use Artificial Intelligence, p.2.

[2] Id. p.2.

[3] Id. p.3.

[4] The Impact of Generative AI on Hollywood and Entertainment, p.3.

[5] Copyright and Artificial Intelligence, Part 2: Copyrightability. A report of the Register of Copyrights, January 2025.

[6] Copyright and Artificial Intelligence, Part 1: Digital Replicas, January 2024.

[7] Id.

[8] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

[9] Copyright and Artificial Intelligence, Part 2: Copyrightability. A report of the Register of Copyrights, January 2025.

[10] IBID p.11.

[11] IBID p.11.

[12] IBID p.27.

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