

How AI Is Causing Real Copyright Uncertainty

By **Chris Villani**

Law360 (January 12, 2026, 12:09 PM EST) -- As artificial intelligence is used increasingly to generate images, sounds, software and other products, attorneys say they are left navigating an uncertain landscape when it comes to securing copyright protections for AI-assisted outputs, with few signs of clarity on the horizon.

The U.S. Copyright Office has taken a firm stand on AI, releasing a report early last year that said having a human direct an AI platform in the creation of something is not enough to warrant copyright protection for whatever the output ends up being.

Jay Myers, a partner with the intellectual property practice at Seyfarth Shaw LLP, said the copyrightability of AI outputs may be an area where technology is rapidly outpacing the law.

"Saying there is no copyright for AI outputs is really troubling to me," Myers said. "I recognize the historical precedent for human authorship. But, to me, this is a new technology, and I don't think it is appropriate for the law to take a hard-line approach and say, definitively, all AI outputs are not copyrightable."

But many outputs that are AI generated are done so with humans influencing the process along the way. It has created some ambiguity that Fish & Richardson PC principal Adam Kessel said is tricky to navigate for attorneys and businesses alike.

"Clients don't know what the law is going to be in a year, much less 10 or 15 years from now," Kessel said. "It makes it hard to plan your IP strategy, so you need to hedge as much as possible and look at protecting things your business has created with a variety of tools, and not put all of your eggs in the copyright basket."

The 'Muddy Middle Ground'

The U.S. Supreme Court is weighing whether to take a case that could clarify the issue. A computer scientist has asked the high court to overturn the Copyright Office after it denied a copyright for an artwork he created using his own AI system.

The artist, Stephen Thaler, argued in his petition that the government's firm stance could chill the use of AI in creative endeavors and "spell the end of copyright protection for many photographs and other works created with technological assistance."

But Anthony Panebianco of Davis Malm PC was skeptical that the Supreme Court would take Thaler's case. Thaler has acknowledged that his work is entirely AI-generated, and the justices would only be weighing in, Panebianco said, to "create a 180-degree swing or a confirmation" of what the Copyright Office and the courts have already said.

"The courts have said 'no.' The prompt engineering, the fine-tuning — it doesn't give you any rights — and they've upheld the Copyright Office's denial," Panebianco said. "Effort, or sweat equity into the project, doesn't equal ownership."

Even if the Supreme Court were to hear Thaler's appeal, the practical effect would be limited, said A.J. Tibbetts, an AI and intellectual property lawyer with Greenberg Traurig LLP.

"His strategy is pretty pointed in saying there is no human involvement whatsoever and seeing how the law could evolve on that point," Tibbetts said. "The responses from the courts in the U.S. have been pretty cut and dry. He has a specific goal that doesn't align with most commercial concerns."

Unlike Thaler's two-dimensional piece of artwork, titled "A Recent Entrance to Paradise," most real-world applications of AI involve significant human input, noted Kessel, adding that generative AI has been hugely significant outside the creative industries.

"The impact on software creation has been faster and more profound than anything else in that the very activity of creating software is totally different from what it was five years ago," he said. "Nobody is writing code anymore. They are giving guidance to tools."

Kessel said it could become more difficult for companies to draw the line between what software is being created by a person and what is more the product of AI.

"The pertinent question that may not get resolved by the Thaler case is how much human input is enough," Kessel said. "That kind of muddy middle ground is going to be the subject of litigation for years to come."

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Another case that has drawn significant attention from attorneys involves a Colorado artist who was denied copyright protection for the first AI-generated image to win an award at the state's fair.

The artist, Jason Allen, created Théâtre D'opéra Spatial using 624 prompts.

"He got the image exactly the way he wanted it and selected the final image as the artwork he wanted," said Seyfarth's Myers. "He exercised a great amount of control over it. There is a sense that the position the Copyright Office is taking and the law are leading to some results that seem to challenge common sense."

Allen's case, which is pending before a Colorado federal judge, is one to watch, said Morgan Lewis & Bockius LLP partner Colleen Ganin.

"It's clear that if there is sufficient human involvement, that's enough to warrant some level of copyright protection," Ganin said. "The elements that were added by the human are eligible for copyright

protection. It's just sort of unclear, at this stage, what is 'sufficient.'"

Myers noted the Copyright Office has done an "incredible" amount of analysis on the topic and that comments weighing in — more than 10,000 comments were received from businesses and the public regarding AI — were "all over the map."

But artists keep finding creative ways to use AI with tremendous success. In October, the song "Walk My Walk," an AI-generated country tune, topped the Billboard country digital song sales chart. Billboard has since said other AI-generated songs have hit the charts.

Myers wondered whether he could sell copies of the song or whether something akin to the 1990s music download fad, driven by platforms like Napster, could return to distribute AI-generated music for free.

"Who is going to enforce it?" he said. "How will they prevent Napsterization? Maybe nobody can prevent it, but it does seem like Napster could come back and allow free downloads of AI songs, and some of those songs could be the most important songs of the year next year."

The Copyright Is in the Details

The unclear picture has left lawyers offering a wide array of advice to clients.

Kessel said some clients are giving "creative thought" to protecting the fruits of their labor when AI is involved, including through contracts, trade secrets and patents, when applicable.

Ganin said it will be important for artists, companies and other content creators to show exactly what they did and where human beings were involved when something has been generated using an AI platform.

For example, an AI-generated image called "A Single Piece of American Cheese" received copyright protection last year after the artist, Kent Keirse, made a case to the Copyright Office that included a video detailing each step of the process he used.

"I could see this being where we are going, needing to substantiate everything," Ganin said. "You'll need to say, 'This is exactly what I did and why I did it, and this is the different human involvement,' as opposed to letting AI take the wheel."

Greenberg Traurig's Tibbetts said he frequently talks to clients about documenting their process to show the human ingenuity involved. It can be important not only for the original work created, he said, but also for downstream products such as merchandise involving a partially AI-generated character.

"It's important to document how that character was created and the various iterations of the AI tool used," Tibbetts said. "Maybe it's notes from meetings. There are lots of different ways to document. But having clear evidence of the creation life cycle for that particular work is helpful."

Even if it does not happen at the breakneck pace of technology, Panebianco said a legislative solution helping to clarify the issue is possible, especially if other countries have less restrictive stances on copyright protections for AI-generated content.

"It will take a long time, but it's hard to imagine that we are not going to be as protective and thoughtful as other countries when it comes to copyright protections," he said. "We want to be seen as leading the cause of protecting our artists and protecting our businesses, and right now, there's a great hole."

--Editing by Lakshna Mehta.

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