THE COPYRIGHT OFFICE AND THE FIRST TWO AI REPORTS

A Very Quick Summary

by ELIZABETH TOWNSEND GARD and BIJOU MGBOJIKWE,[*]
with commentary by BIJOU MGBOJIKWE[**]

INTRODUCTION

As we explore foundational concepts in Artificial Intelligence ("AI"), we would be remiss not to mention the work the Copyright Office has been doing over the last few years. In the tradition of the Journal of Copyright Society and its long 70+-year relationship with the Copyright Office, we would like to excerpt key elements from two important documents: the Copyright Registration Guidance, and the first AI report, focused on digital replicas, also called deepfakes. In keeping with the Journal of the Copyright Society's tradition, this short piece will highlight and excerpt both documents. This is followed by commentary by Bijou Mgbojikwe.

I. COPYRIGHT REGISTRATION GUIDANCE

On March 14, 2023, the Copyright Office released guidance on when and how the Copyright Office would examine and register AI-created works.[1] The policy begins with some background of the Copyright Office's oversight of copyright registration, beginning in 1870. The recent development of generative AI "raise questions about whether the material they produce is protected by copyright, whether works consisting of both human-authored and AI-generated material may be registered, and what information should be provided to the Office by applicants seeking to register them."[2] The policy continues:

> These are no longer hypothetical questions, as the Office is already receiving and examining applications for registration that claim

[*] Editor-in-Chief, Journal of the Copyright Society; John E. Koerner Endowed Professor of Law, Tulane University Law School.
[**] Senior Policy Counsel, Entertainment Software Association.

[1] U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION GUIDANCE: WORKS CONTAINING MATERIAL GENERATED BY ARTIFICIAL INTELLIGENCE 1 (2023) (The policy became effective on March 16, 2023.)

[2] *Id.* at 2.

> copyright in AI-generated material. For example, in 2018 the Office received an application for a visual work that the applicant described as "autonomously created by a computer algorithm running on a machine." The application was denied because, based on the applicant's representations in the application, the examiner found that the work contained no human authorship. After a series of administrative appeals, the Office's Review Board issued a final determination affirming that the work could not be registered because it was made "without any creative contribution from a human actor." (citations omitted)
>
> More recently, the Office reviewed a registration for a work containing human-authored elements combined with AI-generated images. In February 2023, the Office concluded that a graphic novel comprised of human-authored text combined with images generated by the AI service Midjourney constituted a copyrightable work, but that the individual images themselves could not be protected by copyright.
>
> The Office has received other applications that have named AI technology as the author or co-author of the work or have included statements in the "Author Created" or "Note to Copyright Office" sections of the application indicating that the work was produced by or with the assistance of AI. Other applicants have not disclosed the inclusion of AI-generated material but have mentioned the names of AI technologies in the title of the work or the "acknowledgments" section of the deposit.
>
> Based on these developments, the Office concludes that public guidance is needed on the registration of works containing AI-generated content. This statement of policy describes how the Office applies copyright law's human authorship requirement to applications to register such works and provides guidance to applicants.
>
> The Office recognizes that AI-generated works implicate other copyright issues not addressed in this statement. It has launched an agency-wide initiative to delve into a wide range of these issues. Among other things, the Office intends to publish a notice of inquiry later this year seeking public input on additional legal and policy topics, including how the law should apply to the use of copyrighted works in AI training and the resulting treatment of outputs.

What is interesting about this policy is that at the heart of the issue is the authorship requirement from the IP clause of the U.S. Constitution: authors have been interpreted as needing to be human.[3] We saw it previously with the 2018

[3] *Id.* at 2; U.S. CONST. art. 1, § 8, cl. 8 ("To 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.").

monkey selfies case, *Naruto v. Slater*.[4] And now, the Copyright Office weighs in on AI-generated works. For support of the concept of human authorship, the Copyright Office turns to a well-known foundational case, *Burrow-Giles v. Sarony*.[5]

In its leading case on authorship, the Supreme Court used language excluding nonhumans in interpreting Congress's constitutional power to provide "authors" the exclusive right to their "writings." In *Burrow-Giles Lithographic Co. v. Sarony*, a defendant accused of making unauthorized copies of a photograph argued that the expansion of copyright protection to photographs by Congress was unconstitutional because "a photograph is not a writing nor the production of an author" but is instead created by a camera. The Court disagreed, holding that there was "no doubt" the Constitution's Copyright Clause permitted photographs to be subject to copyright, "so far as they are representatives of original intellectual conceptions of the author." The Court defined an "author" as "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature." It repeatedly referred to such "authors" as human, describing authors as a class of "persons" and a copyright as "the exclusive right of a man to the production of his own genius or intellect." (citations omitted)

Federal appellate courts have reached a similar conclusion when interpreting the text of the Copyright Act, which provides copyright protection only for "works of authorship." The Ninth Circuit has held that a book containing words "authored by non-human spiritual beings" can only qualify for copyright protection if there is "human selection and arrangement of the revelations." In another case, it held that a monkey cannot register a copyright in photos it captures with a camera because the Copyright Act refers to an author's "children," "widow," "grandchildren," and "widower,"— terms that "all imply humanity and necessarily exclude animals." (citations omitted).

The Copyright Office then references support for this from each of the Compendiums: 1973, 1984, and the current version. The policy then turns to a different way of viewing materials that include AI-generated components: human authorship plus uncopyrightable material, "including material generated by or with the assistance of technology."[6] The question is who produced the work: human or machine? In the case of works containing AI-generated material, the Office will consider whether the AI contributions are the result of "mechanical reproduction" or instead of an author's "own original mental conception, to which [the author] gave visible form." The answer will depend on the circumstances, particularly how the AI tool operates and how it was used to create the final work. This is necessarily a case-by-case inquiry." The policy explains:

> If a work's traditional elements of authorship were produced by a machine, the work lacks human authorship and the Office will not

[4] 888 F.3d 418 (9th Cir. 2018).
[5] 111 U.S. 53 (1884).
[6] Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, *supra* note 2 at 3.

> register it. For example, when an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the "traditional elements of authorship" are determined and executed by the technology—not the human user. Based on the Office's understanding of the generative AI technologies currently available, users do not exercise ultimate creative control over how such systems interpret prompts and generate material. Instead, these prompts function more like instructions to a commissioned artist—they identify what the prompter wishes to have depicted, but the machine determines how those instructions are implemented in its output. For example, if a user instructs a text-generating technology to "write a poem about copyright law in the style of William Shakespeare," she can expect the system to generate text that is recognizable as a poem, mentions copyright, and resembles Shakespeare's style. But the technology will decide the rhyming pattern, the words in each line, and the structure of the text. 30 When an AI technology determines the expressive elements of its output, the generated material is not the product of human authorship.31 As a result, that material is not protected by copyright and must be disclaimed in a registration application.
>
> In other cases, however, a work containing AI-generated material will also contain sufficient human authorship to support a copyright claim. For example, a human may select or arrange AI-generated material in a sufficiently creative way that "the resulting work as a whole constitutes an original work of authorship." Or an artist may modify material originally generated by AI technology to such a degree that the modifications meet the standard for copyright protection. In these cases, copyright will only protect the human-authored aspects of the work, which are "independent of " and do "not affect" the copyright status of the AI-generated material itself.

This policy does not mean that technological tools cannot be part of the creative process. Authors have long used such tools to create their works or to recast, transform, or adapt their expressive authorship. For example, a visual artist who uses Adobe Photoshop to edit an image remains the author of the modified image, 36 and a musical artist may use effects such as guitar pedals when creating a sound recording. In each case, what matters is the extent to which the human had creative control over the work's expression and "actually formed" the traditional elements of authorship. (citations omitted)

The remainder of the policy contains guidance for copyright applicants including AI-generated content in their registration applications:

- You must use the Standard Application, and describe the part of the work created by a human.
- You can creatively select, coordinate, and arrange human and non-human materials

- The AI technology you used should not be included on the application.
- AI-generated components of the work should be explicitly excluded from the application in the "Limitation of Claim" section under the "Materials Excluded."
- The Copyright Office may contact the applicant if there are further questions.

The policy also provides guidance on how to correct previously submitted applications with AI-generated content.

II. COPYRIGHT OFFICE'S NOTICE OF INQUIRY, AUGUST 2023

The Copyright Office received over 10,000 comments from the public in response to its Notice of Inquiry, published in August 2023.[7] The study is an attempt to assess whether legislative or regulatory changes are necessary: "the Office seeks comment on these issues, including those involved in the use of copyrighted works to train AI models, the appropriate levels of transparency and disclosure with respect to the use of copyrighted works, and the legal status of AI-generated outputs."[8]

The NOI began with the recognition that over the last year AI had rapidly developed, with "significant media and public attention."[9] The NOI noted that some of the questions related to the scope and level of human authorship necessary to obtain copyright, along with copyright holders bringing infringement claims against AI companies "based on the training process for, and outputs derived from, generative AI systems."[10]

The NOI contextualizes previous work of the Copyright Office with machine learning and AI, starting in 1965 and the question of authorship of works "written by computers."[11] Was the computer a tool of creation, or was the computer doing the creating? This was a question that Barbara Ringer, at that time head of the Office's Examining Division "warned that the Office could not 'take the categorical position that registration will be denied merely because a computer

---

[7] Letter from Register Shira Perlmutter to the Honorable Bryan Steil and the Honorable Joseph D. Morelle (Oct. 30, 2024), from U.S. COPYRIGHT OFFICE REGISTER OF COPYRIGHTS OF THE U.S., https://www.copyright.gov/laws/hearings/letter-to-cha-steil-morelle-10-30-2024.pdf (last visited Dec. 12, 2024) (noting that each of the 10,000 comments were also reviewed individually).

[8] Artificial Intelligence and Copyright, 88 Fed. Reg. 59942, 59942 (2023).

[9] *Id.* (quoting Kim Martineau, *What is generative AI?*, IBM RESEARCH BLOG (Apr. 20, 2023), https://research.ibm.com/blog/what-is-generative-AI).

[10] *Id.* at 59943.

[11] *Id*. (referencing a term of art used from U.S. COPYRIGHT OFFICE, SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1965, at 5 (1966), https://copyright.gov/reports/annual/archive/ar-examining1965.pdf).

may have been used in some manner in creating the work.'"[12] Then, in 1991, WIPO co-hosted a conference with the Copyright Office and the USPTO related to AI issues.[13]

And then there was 2022, where in two instances the Copyright Office had to publicly address whether AI-generated materials were copyrightable, and what the requisite human authorship was needed. The AI Initiative launched by the Copyright Office was in response to the growing concern of both Congress and the public.

The AI Initiative by the Copyright Office has four major policy issues that they seek public comments:

> (1) the use of copyrighted works to train AI models;
> (2) the copyrightability of material generated using AI systems;
> (3) potential liability for infringing works generated using AI systems; and
> (4) the treatment of generative AI outputs that imitate the identity or style of human artists.[14]

Let's see how they describe each issue as of 2023:

As to the first issue, the Office is aware that there is disagreement about whether or when the use of copyrighted works to develop datasets for training AI models (in both generative and non-generative systems) is infringing. This Notice seeks information about the collection and curation of AI datasets, how those datasets are used to train AI models, the sources of materials ingested into training, and whether permission by and/ or compensation for copyright owners is or should be required when their works are included. To the extent that commenters believe such permission and/or compensation is necessary, the Office seeks their views on what kind of remuneration system(s) might be feasible and effective. The Office also seeks information regarding the retention of records necessary to identify underlying training materials and the availability of this information to copyright owners and others.

On the second issue, the Office seeks comment on the proper scope of copyright protection for material created using generative AI. Although we believe the law is clear that copyright protection in the United States is limited to works of human authorship, questions remain about where and how to draw the line between human creation and AI-generated content. For example, are there circumstances where a human's use of a generative AI system could involve

---

[12] *Id.* (citing U.S. COPYRIGHT OFFICE, ANNUAL REPORT OF THE EXAMINING DIVISION, COPYRIGHT OFFICE, FOR THE FISCAL YEAR 1965, at 4 (1965), https://copyright.gov/reports/annual/archive/ar-examining1965.pdf).

[13] *See* U.S. COPYRIGHT OFFICE, 94TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1991, at 2 (1991), https://copyright.gov/reports/annual/archive/ar-1991.pdf.

[14] Artificial Intelligence and Copyright, 88 Fed. Reg. at 59945.

sufficient control over the technology, such as through the selection of training materials and multiple iterations of instructions ("prompts"), to result in output that is human-authored? Resolution of this question will affect future registration decisions. While the Office is separately working to update its registration guidance on works that include AI-generated material, this Notice explores the broader policy questions related to copyrightability.

On the third question, the Office is interested in how copyright liability principles could apply to material created by generative AI systems. For example, if an output is found to be substantially similar to a copyrighted work that was part of the training dataset, and the use does not qualify as fair, how should liability be apportioned between the user whose instructions prompted the output and developers of the system and dataset?

Lastly, in both our listening sessions and other outreach, the Office heard from artists and performers concerned about generative AI systems' ability to mimic their voices, likenesses, or styles. Although these personal attributes are not generally protected by copyright law, their copying may implicate varying state rights of publicity and unfair competition law, as well as have relevance to various international treaty obligations.[15]

The remainder of the NOI was a series of questions divided into categories:

- General Questions (Question 1-5)
- Training (Questions 6-14)
- Transparency and Recordkeeping (Questions 15-17)
- Generative AI Outputs
  - ⇒ Copyrightability (Questions 18-21)
  - ⇒ Infringement (Questions 22-27)
  - ⇒ Labeling and Identification (Questions 28-29)
  - ⇒ Additional Questions about Issues Related to Copyright (Questions 30-34)

The also included a glossary of terms related to AI. Over 10,000 responses came in. The public is interested.

III. COPYRIGHT AND AI REPORT: PART I - DIGITAL REPLICAS – JULY 2024

A. Summary of the Report

A little over a year after the NOI, in July 2024, the Copyright Office issued the first of a series of reports on copyright and AI. The report is 58 pages long. We have reprinted the Executive Summary. Another trajectory related to AI had developed in 2023, and this involved deepfakes and digital replicas.

---

[15] *Id.* at 6-7.

This first report addresses the concerns and Congressional actions in progress: do we need a federal right of publicity to address unauthorized uses of a person's likeness using AI and other technologies?

The Report begins with the release in April 2023 of the not-Drake and The Weekend song "Heart on my Sleeve," or the "Fake Drake" — the digital replica— that was viewed by 15 million on social media and 600,000 on Spotify. It was unauthorized, AI-generated replicas. The Report uses the term "digital replica" to "refer to a video, image or audio recording that has been digitally created or manipulated to realistically but falsely depict on individual. (2). The Report also refers to digital replicas as "deep fakes" although the types of AI-generated content are not the same. Not all digital replicas are harmful. They use the example of Randy Travis, who used digital replicas after suffering a stroke to release a new song.

But the report focuses on the harms, including political harms, personal harms, and economic harms. As part of the NOI, the Copyright Office asked, "what existing laws apply to AI-generated material that features the voice or likeness of a particular person; whether Congress should enact a new federal law that would protect against unauthorized digital replicas; and, if so, what its contours should be. We also inquired whether there are or should be protections against AI systems generating outputs that imitate artistic style." (7). One thousand people responded to this series of questions, 90% from individuals.

Part II of the report looks at existing laws that might help: state common laws and statutory laws, including right of privacy, right of publicity, and new state regulations related to digital replicas.

The report suggests the need for federal legislation, because there are shortcomings in existing laws. Two federal laws have been introduced: the No Artificial Intelligence Fake Replicas And Unauthorized Duplications (No AI FRAUD Act) and the Nurture Originals, Foster Art, and Keep Entertainment Safe Act (No FAKES) Act. The Report reviews each.

Part III of the Report turns to the question of protection of artistic style. While many of the comments were concerned about this, the Copyright Office notes that copyright law "is limited" in this area but that causes of action in other areas of law may provide relief. (54) The report concluded numerous commenters "asserted the urgent need for new protection at the federal level." (57).

We have reprinted excerpts from the Executive Summary:

> This first Part of the Copyright Office's Report on copyright and artificial intelligence ("AI")1 addresses the topic of digital replicas. From AI-generated musical performances to robocall impersonations of political candidates to images in pornographic videos, an era of sophisticated digital replicas has arrived. Although technologies have long been available to produce fake images or recordings, generative AI2 technology's ability to do so easily, quickly, and with uncanny verisimilitude has drawn the attention and concern of creators, legislators, and the general public.

Section I summarizes the context and history of the Office's study of the digital replicas issue.

Section II.A outlines the main existing legal frameworks: state rights of privacy and publicity, including recent legislation specifically targeting digital replicas, and at the federal level, the Copyright Act, the Federal Trade Commission Act, the Communications Act, and the Lanham Act.

In Section II.B, we explain why existing laws do not provide sufficient legal redress for those harmed by unauthorized digital replicas and propose the adoption of a new federal law. We make the following recommendations regarding its contours:

• Subject Matter. The statute should target those digital replicas, whether generated by AI or otherwise, that are so realistic that they are difficult to distinguish from authentic depictions. Protection should be narrower than, and distinct from, the broader "name, image, and likeness" protections offered by many states.

• Persons Protected. The statute should cover all individuals, not just celebrities, public figures, or those whose identities have commercial value. Everyone is vulnerable to the harms that unauthorized digital replicas can cause, regardless of their level of fame or prior commercial exposure.

• Term of Protection. Protection should endure at least for the individual's lifetime. Any postmortem protection should be limited in duration, potentially with the option to extend the term if the individual's persona continues to be exploited

• Infringing Acts. Liability should arise from the distribution or making available of an unauthorized digital replica, but not the act of creation alone. It should not be limited to commercial uses, as the harms caused are often personal in nature. It should require actual knowledge both that the representation was a digital replica of a particular individual and that it was unauthorized.

• Secondary Liability. Traditional tort principles of secondary liability should apply. The statute should include a safe harbor mechanism that incentivizes online service providers to remove unauthorized digital replicas after receiving effective notice or otherwise obtaining knowledge that they are unauthorized. • Licensing and Assignment. Individuals should be able to license and monetize their digital replica rights, subject to guardrails, but not to assign them outright. Licenses of the rights of minors should require additional safeguards.

• First Amendment Concerns. Free speech concerns should expressly be addressed in the statute. The use of a balancing framework, rather than categorical exemptions, would avoid overbreadth and allow greater

> flexibility. • Remedies. Effective remedies should be provided, both injunctive relief and monetary damages. The inclusion of statutory damages and/or prevailing party attorney's fees provisions would ensure that protection is available to individuals regardless of their financial resources. In some circumstances, criminal liability would be appropriate.
>
> • Relationship to State Laws. Given well-established state rights of publicity and privacy, the Office does not recommend full federal preemption. Federal law should provide a floor of consistent protection nationwide, with states continuing to be able to provide additional protections. It should be clarified that section 114(b) of the Copyright Act does not preempt or conflict with laws restricting unauthorized voice digital replicas.
>
> Section III discusses protection against AI outputs that deliberately imitate an artist's style. We acknowledge the seriousness of creators' concerns and identify legal remedies available to address this type of harm. We do not, however, recommend including style in the coverage of new legislation at this time.

And the conclusion of the Report:

> We recommend that Congress establish a federal right that protects all individuals during their lifetimes from the knowing distribution of unauthorized digital replicas. The right should be licensable, subject to guardrails, but not assignable, with effective remedies including monetary damages and injunctive relief. Traditional rules of secondary liability should apply, but with an appropriately conditioned safe harbor for OSPs. The law should contain explicit First Amendment accommodations. Finally, in recognition of well-developed state rights of publicity, we recommend against full preemption of state law (57)

B. Commentary by Bijou Mgbojikw

As part of its cautious and considered approach on the subject of AI and copyright law and policy, the Copyright Office further delayed the release of the remaining reports that are part of its AI study. Because of the volume of comments the Office received in response to its 2023 NOI, the Office decided to break up the results of its study into smaller reports focusing on discrete issues. After the publication of its first report on digital replicas, the Office said the public could expect more reports on the copyrightability of generative AI output, ingestion and fair use, and liability and infringement initially by the fall of 2024 then later before the end of the year and most recently, in response to Congressional inquiry, in 2025. In its December 16th letter to the Chairs and Ranking Members of the Senate and House intellectual property subcommittees, the Register of Copyrights said that part 2 of its report on copyrightability would be published in January 2025 and part 3 on ingestion and liability in the first quarter of 2025. The Office

also plans to launch a process seeking public comment as it seeks to update the Compendium of U.S. Copyright Office Practices on AI.

IV. COPYRIGHT AND AI REPORT: PART II - JANUARY 2025

A. Summary

On January 29th, 2025, the Copyright Office issued the second in a series of reports with a focus on the copyrightability of generative AI output.[16] The Office confirmed that the third report on the allocation of liability for copyright infringement will be the final one in the series and will be published later this year.[17]

The Office noted in its executive summary that about half of the responses to its 2023 NOI addressed the question of copyrightability with most of the comments agreeing with the premise that no legislative change is needed and that purely machine-generated content is not copyrightable. However, views diverged when it came to the issue of human contribution and how much was sufficient to create authorship thereby rendering a work eligible for copyright protection.

The report is organized into four parts. Section I talks about how copyright law has adapted to technological changes since the nineteenth century with generative AI technology being no different. Section II summarizes the technologies under discussion, the existing legal framework on authorship and the application of the law to different scenarios involving human contribution. Section III outlines the international legal landscape on generative AI and copyrightability and section IV discusses why the Office believes generative AI is not entitled to any additional or special protection nor why further legal clarity on uses is needed.

We have reprinted excerpts from the Executive Summary below:

> This second Part of the Copyright Office's Report on Copyright and Artificial Intelligence ("AI") addresses the copyrightability of outputs generated by AI systems. It analyzes the type and level of human contribution sufficient to bring these outputs within the scope of copyright protection in the United States.
>
> Of the more than 10,000 comments the Office received in response to its Notice of Inquiry ("NOI"), approximately half addressed copyrightability. The vast majority of commenters agreed that existing law is adequate in this area and that material generated wholly by AI is not copyrightable.
>
> Commenters differed, however, as to protection for generative AI outputs that involve some form of human contribution. They expressed

[16] U.S. Copyright Office, Copyright and Artificial Intelligence, Part 2: Copyrightability: A Report of the Register of Copyrights, January 2025, https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyrightability-Report.pdf.

[17] *Id.*

> divergent views on what types and amounts of contribution could constitute authorship under existing law. Many also stressed the desirability of greater clarity in this area, including with respect to the use of AI as a tool in the creative process.
>
> As a matter of policy, some argued that extending protection to materials created by generative AI would encourage the creation of more works of authorship, furthering progress in culture and knowledge to the benefit of the public. The Office also heard concerns that an increased proliferation of AI-generated outputs would undermine incentives for humans to create.
>
> While recognizing that copyrightability is determined on a case-by-case basis, in this Part the Office sets out the legal principles that govern the analysis and assesses their application to AI-generated content.[18]

And then it summarizes the finding:

> Based on an analysis of copyright law and policy, informed by the many thoughtful comments in response to our NOI, the Office makes the following conclusions and recommendations:
>
> - Questions of copyrightability and AI can be resolved pursuant to existing law, without the need for legislative change.
> - 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.
> - Copyright does not extend to purely AI-generated material, or material where there is insufficient human control over the expressive elements.
> - Whether human contributions to AI-generated outputs are sufficient to constitute authorship must be analyzed on a case-by-case basis.
> - Based on the functioning of current generally available technology, prompts do not alone provide sufficient control.
> - 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.
> - The case has not been made for additional copyright or sui generis protection for AI-generated content.[19]

And the conclusion of the report:

---

[18] *Id* at ii.

[19] *Id* at iii.

Based on the fundamental principles of copyright, the current state of fast-evolving technology, and the information received in response to the NOI, the Copyright Office concludes that existing legal doctrines are adequate and appropriate to resolve questions of copyrightability. Copyright law has long adapted to new technology and can enable case-by-case determinations as to whether AI-generated outputs reflect sufficient human contribution to warrant copyright protection. As described above, in many circumstances these outputs will be copyrightable in whole or in part—where AI is used as a tool, and where a human has been able to determine the expressive elements they contain. Prompts alone, however, at this stage are unlikely to satisfy those requirements. The Office continues to monitor technological and legal developments to evaluate any need for a different approach.

B. *Commentary by Bijou Mgbojikwe*

In its report, the Office largely re-affirmed its original positions articulated in its March 2023 guidance on AI, such as, for example, that determinations of eligibility are still fact-specific. In some instances, however, it appears the Office did somewhat soften its perspective, particularly on the impact of the use of generative AI tools in the creation of content, which, in doing so, it believes addresses the call in the comments for greater legal certainty surrounding the use of those tools.

The Office is not alone in the positions it takes with respect to prompts and machine-generated content. In section III of its report, it surveys legal approaches to AI-generated content in key markets around the world and finds that South Korea and the European Union are mostly in agreement with the U.S. However, in China, a court has found that the prompts to create an image using generative AI were creative enough to constitute authorship making the resulting image the author's personal expression and therefore copyrightable. And in Japan, prompts may constitute authorship if they meet certain requirements. The fragmentation in potential protection for AI-generated content internationally may pose challenges to copyright owners seeking to protect their works in which such content is used in different countries.

CONCLUSION FOR NOW

For now, we wait for the third report, which is expected later in 2025. We are also waiting for AI copyright cases working their way through the courts.