

AI and Copyright

What Nonprofits Need to Know

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Copyright and AI – the Issues

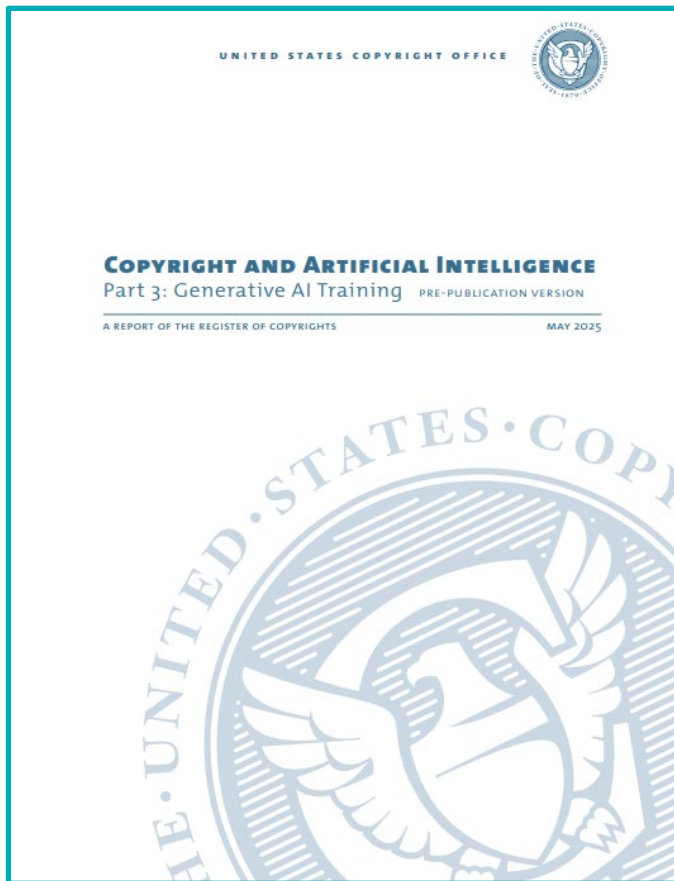
- **State of the Law**
 - Copyright Office, Administration, and the Courts
- **AI Generated Works**
 - Copyrightability and the Human Authorship Requirement
 - Potential Risks in Output
 - Digital Replicas
- **Training AI Models Using Copyrighted Content**
 - Infringement or Fair Use?
- **Practical Considerations**
 - Licensing, Enforcement, and AI Governance

State of the Law

Copyright Office, Administration, and the Courts

State of the Law:

U.S. Copyright Office Report on Artificial Intelligence



The Copyright Office issued its report in three parts to address these topics and evaluate the potential areas for congressional action.

1. July 31, 2024: Digital Replicas
2. January 17, 2025: Copyrightability of AI-generated works
3. May 9, 2025: Training AI Models Using Copyrighted Materials

State of the Law:

Administration's AI Action Plan

AI Executive Order

- Jan. 23, 2025, “Removing Barriers to American Leadership in Artificial Intelligence”

AI Action Plan

- July 23, 2025, “Winning the Race America’s AI Action Plan”
- Stated goals of accelerating innovation, building out AI infrastructure, and enhancing global partnerships and security
- Speech announcing Plan stated there should be a “common-sense application of artificial and intellectual property rules”; stating that “licensing everything” is “just not doable” and noting that “China is not doing it”
- AI should be regulated by “federal rule and regulation” and “not 50 different states regulating this industry of the future.” But not indicating that any legislation is forthcoming and no EOs re copyright.

State of the Law:

Case Law Developing

- Appeals Pending relating to copyrightability of AI-generated works
- Dozens of ongoing litigation related to training AI models and whether the use of copyrighted content is an infringement or defensible as a “fair use”; individual parties as well as class actions
 - Images
 - Text/Language
 - Software
 - Music

AI Generated Works

Copyrightability, Output Risks, Digital Replicas

AI Generated Work Considerations

Copyrightability – Human Authorship Requirement

- Existing framework where the US Copyright Act and the Supreme Court require *human* authorship
 - Copyright Clause: Congress may “secure for limited times to authors... the exclusive right to their” creative works.
 - Supreme Court has explained “the author [of a copyrighted work] is ... the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”

Naruto v. Slater, No. 16-15469 (9th Cir. 2018)

Monkey “is not an author within the meaning of the Copyright Act.”



AI Generated Work Considerations (cont.)

Copyrightability – Human Authorship Requirement



Stephen Thaler, DABUS, *A Recent Entrance to Paradise*.

- Copyright Office **refused** registration: lack of human authorship.
- DC District Court **affirmed**: human author requirement “rests on centuries of settled understanding.”
- Court of Appeals for the DC Circuit **affirmed** requirement of human authorship.



Jason M. Allen, Midjourney, *Théâtre D'opéra Spatial*.

- Copyright Office **refused** registration: lack of human authorship.
- **Prompts are insufficient**: 624 prompts “do not make him the author of the Midjourney Image.”
- Appeal pending to Colorado District Court.

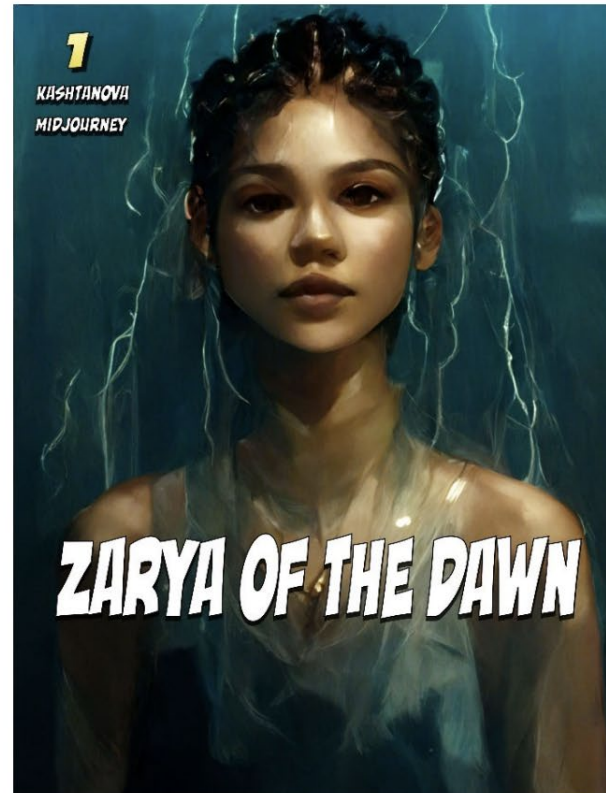
AI Generated Work Considerations (cont.)

Copyrightability – Human Authorship Requirement

Where a portion of the work is AI generated, the human authorship is still copyrightable.

Kashtanova, *Zarya of the Dawn*

- Copyright Office reissued certificate covering narrowed authorship of “text” and “selection, coordination and arrangement of text created by the author and artwork generated by artificial intelligence.”



AI Generated Work Considerations (cont.)

Copyrightability – Human Authorship Requirement

- **US Copyright Office Report, Part 2 re Copyrightability**
 - Analyzes the type and level of human contribution sufficient for outputs created using generative AI to be eligible for copyright protection.
 - The report does not recommend new legislation, concluding that copyright law principles are flexible enough to apply to generative AI technology.
 - Human expression recognizable and identifiable in AI output may be copyrightable; but prompts alone and/or “prompt engineering” are not sufficient human contribution to render the output copyrightable.

Prompt

professional photo, bespectacled cat in a robe reading the Sunday newspaper and smoking a pipe, foggy, wet, stormy, 70mm, cinematic, highly detailed wood, cinematic lighting, intricate, sharp focus, medium shot, (centered image composition), (professionally color graded), ((bright soft diffused light)), volumetric fog, hdr 4k, 8k, realistic

Output



AI Generated Work Considerations (cont.)

Potential Risks in the Output



- Consideration of whether the *output* carries risk
 - Copyright infringement
 - Right of publicity infringement
 - Trademark infringement
- Human review necessary
- How the output (and input) may be used by the tool
- Contractual term consideration, including guarantees or indemnification or limitations on use

AI Generated Work Considerations (cont.)

Digital Replicas

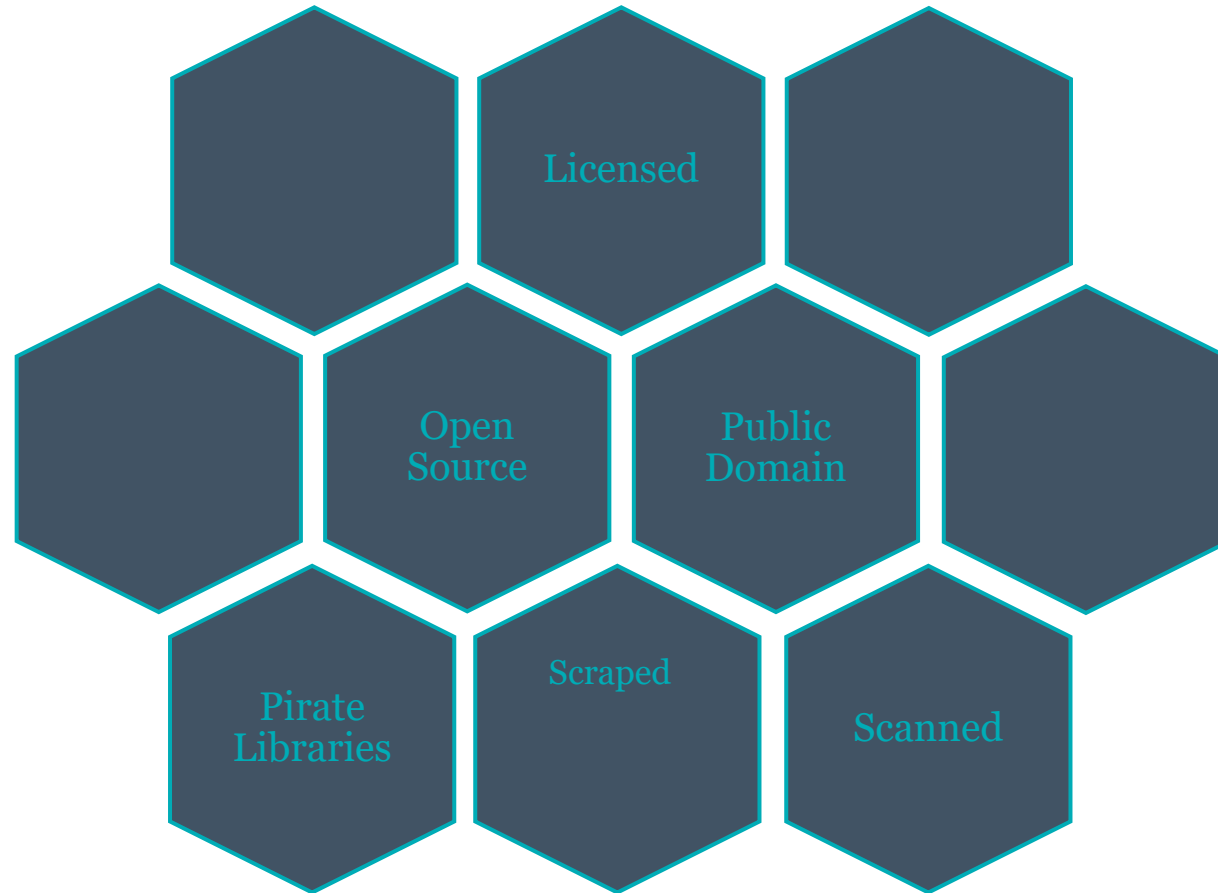
- **USCO Report, Part 1 re Digital replicas**
 - **Digital Replica** = “a video, image, or audio recording that has been digitally created or manipulated to realistically but falsely depict an individual ... produced by any type of digital technology, not just AI.”
 - The report calls for a new federal protection for “replicas that convincingly appear to be the actual individual being replicated.”
- **Take It Down Act**
 - May 19, 2025, President Trump signed into law.
 - imposes strict takedown obligations and creates new civil and criminal liabilities for individuals and platforms that distribute **nonconsensual intimate images**.
 - Covered Platforms must by May 2026 provide a **notice-and-takedown** notification process allowing affected persons to request the removal of intimate visual depictions of an identifiable individual posted without consent.
- **NO FAKES Act (Nurture Originals, Foster Art, and Keep Entertainment Safe)**
 - Reintroduced in both the House and Senate in April, 2025; bipartisan.
 - Creates a property right in a person’s voice and visual likeness in a digital replica.

Training AI Models Using Copyrighted Content

Infringement or Fair Use

Training AI Models Using Copyrighted Content

Sources of Content



Training AI Models Using Copyrighted Content (cont.)

Infringement or Fair Use?

Fair Use: The Copyright Act (17 U.S.C. § 107) identifies **four factors** to evaluate:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - Including whether the use is *transformative*
2. the nature of the copyrighted work
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. the effect of the use upon the potential market for or value of the copyrighted work

Training AI Models Using Copyrighted Content (cont.)

U.S. Copyright Office Report – *Might* be Fair Use

Detailed discussion of fair use.

- a. Weighed four fair use factors, highlighting the different positions of creators and authors (who say this will destroy artist livelihood and diminish human creativity) and the AI developers (who say requiring license or imposing liability would stifle development of AI technology) and sharing its own views of each factor.
- b. Opines that fair use is **fact specific** and depending on the uses, the training model, the outputs, the market for the work, there will be “*some uses of copyrighted works for generative AI training will qualify as fair use, and some will not.*”
- c. Briefly discussed international applications, including the EU AI Act and TDM exceptions in various countries.
- d. Noted that the comments they received there was far more support for voluntary licensing and little support for compulsory licensing.

Does NOT recommend legislation

“American leadership in the AI space would best be furthered by supporting both of these world-class [technology and creative] industries that contribute so much to our economic and cultural advancement.

Effective licensing options can ensure that innovation continues to advance without undermining intellectual property rights. These groundbreaking technologies should benefit both the innovators who design them and the creators whose content fuels them, as well as the general public.”

Training AI Models Using Copyrighted Content (cont.)

Case Decisions Evaluating the Factors

- *Thomson Reuters v. Ross Intelligence*, D.Del., Feb. 11, 2025, Judge Bibas
 - West Headnotes used to train competing legal research platform
 - Found not a fair use
 - Key factors: (1) commercial; (4) direct competitor
- *Kadrey v. Meta*, N.D.Cal., June 24, 2025, Judge Chhabria
 - Books for training LLM, Llama
 - Found a fair use
 - Key factors: (1) Found use was “highly transformative” with “further purpose” and “different character”; (4) Discussed the potential market harm extensively and considered the theory of “dilution of the market” as “the only viable theory” but that the plaintiffs had not submitted evidence of that harm

Training AI Models Using Copyrighted Content (cont.)

Case Decisions Evaluating the Factors

- *Bartz v. Anthropic*, N.D.Cal., June 23, 2025, Judge Alsup
 - Books used to create central library and train LLM
 - Split decision:
 - Download of pirated copies of works to create a central library not a fair use
 - Purchased and scanned copies of works to train LLM was a fair use
 - Key factors: (1) “quintessentially transformative”; (4) the LLMs and their outputs would not “displace demand for copies of Author’s works” and rejected a theory of market harm that creation of similar books would dilute the market for the author’s works
 - Appealed but trial was still on schedule
 - Settlement was announced and the parties are seeking Judge’s approval
 - Amount was disclosed to be \$1.5 billion (\$3,000 per work) with agreement to destroy the library of pirated content

Practical Considerations

Licensing, Enforcement, and AI Governance

Practical Considerations

Licensing, Enforcement

Licensing and market changes

- USCO proposed as the marketplace solution
- Coming to pass that increased licensing as a potential marketplace solution
 - Examples:
 - OpenAI licensing from various news and media companies like NewsCorp
 - Anthropic seeming licensing from the authors as part of the settlement
 - Perplexity Publishers Program partnering with media companies, Time, Fortune, Texas Tribune
 - Amazon deal with The New York Times

Enforcement

- Regulations, guidelines, such as opt-out options from TDM allowances
- Technology measures like SynthID digital watermark, Cloudflare blocking AI crawlers

Practical Considerations (cont.)

AI Governance and Internal Policies



AI Use Guidelines

Input considerations
Output considerations
Internal, members, volunteers, vendors



AI Tool Selection/Approval

Tool differences
Enterprise vs Public versions



Training and transparency

Regular training and updates



Other considerations

Privacy
Data security
Bias
Misinformation

AI and IP: The Legal Frontier

S1:E1 Drops Next Tuesday, Sept. 23

AI is more than another tech trend, it's the next frontier, where its users are reimagining and reshaping how companies operate and compete. But with that opportunity comes risk. Join Justin Pierce, co-chair of the firm's IP division, for Venable's newest podcast



that explores AI regulatory developments and litigation risks, and strategies for protecting your IP—conversations that will help you use AI and the law as levers for growth and differentiation.

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