Copyright Office Review Board Affirms Refusal of Artificial Intelligence Authorship

By Charley F. Brown and Jonathan P. Hummel

The Copyright Office Review Board (Board) has affirmed the Copyright Office's refusal of a work created with the use of artificial intelligence (AI) software.

The Board's opinion (Opinion)[1] came after a copyright application originally filed in 2021 listed a human author and an AI software program called RAGHAV Artificial Intelligence Painting App (RAGHAV). The Board maintained in its opinion its position that human authorship is necessary to support a copyright claim.

THE CASE

On December 1, 2021, Ankit Sahni submitted an application to register a claim in work, that listed Sahni and RAGHAV as authors. Because the application featured AI as an author, the Copyright Office refused to register the work because "it lacked the human authorship necessary to support a copyright claim."

In September 2022, Sahni requested reconsideration arguing "the human authorship requirement does not and cannot mean a work must be created entirely by a human author."

The authors, attorneys with Ballard Spahr LLP, may be contacted at browncf@ballardspahr.com and hummelj@ballardspahr.com, respectively.

Upon reconsideration, the application was again refused because "the work . . . is a derivative work that does not contain enough original human authorship to support a registration."

In a second request for reconsideration, Sahni argued that:

- The AI software was merely "an assistive software tool," subject to creative decisions;

- The work featured sufficient human-authored elements; and

- The work is not derivative because it is not substantially similar to the original photograph submitted by Sahni as a prompt to the AI software.

Upon consideration, the Board ultimately found the "Work does not contain sufficient human authorship necessary to sustain a claim to copyright." In doing so, the Board echoed the district court's conclusion in *Thaler v. Perlmutter*[2] that "human authorship is a bedrock requirement of copyright."

The Board offers additional details saying that when analyzing AI-generated material, the Copyright Office "must determine when a human user can be considered the 'creator' of AI-generated

output." In guidance from March 2023,[3] the Copyright Office advised that it will ask whether:

> the "work" is basically one of human authorship, with the computer [or other device] merely being an assisting instrument, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually conceived and executed not by man but by a machine.

To note, the crux of Sahni's argument is that his selection of a base image, a style image (which dictates the "style" of the final image), and the strength of the style image "cumulatively resulted in the Work, which is a direct outcome of Mr. Sahni's creative expression and contribution." He argued his use of the RAGHAV AI software was "not any different from . . . Adobe Photoshop applying red and blue shades to a photograph based on a user's command."

The Board disagreed, finding in its Opinion, "the expressive elements of pictorial authorship were not provided by Mr. Sahni," and "the RAGHAV app, not Mr. Sahni, was responsible for determining how to interpolate the base and style images in accordance with the style transfer value." Thus, the RAGHAV application was not "an assistive tool [similar to] a camera, digital tablet, or a photo-editing software program." Specifically, the Board asserted, "it is the AI model, not its user, that 'predict[s] stylizations for paintings and textures never previously observed.'"

Copyright hopefuls should therefore be wary of applying for copyright in works generated using AI Software. The Board draws a distinction between standard photo-editing software like Adobe Photoshop and photo-generating software like RAGHAV or Canva. It remains to be seen whether a work resulting from greater human creative input and a lesser degree of AI input, such as the use of AI to edit a work, will be granted copyright protection.

THE BOTTOM LINE

Copyright hopefuls should be wary of applying for copyright in works generated using AI Software. The Board draws a distinction between photo-editing and photo-generating software. It remains to be seen whether a work resulting from greater human creative input and a lesser degree of AI input, such as the use of AI to edit a work, will be granted copyright protection.

Notes

1. https://copyright.gov/rulings-filings/review-board/docs/SURYAST.pdf.
2. https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2022cv1564-24.
3. https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf.

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