

The Code Red for Copyright Law

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Abstract

On March 16, 2023, the U.S. Copyright Office issued a new Guidance on Works Containing Material Generated by Artificial Intelligence (“AI Guidance”) that went into immediate effect. This Essay explains why the Office’s AI Guidance is fundamentally flawed on both procedural and substantive grounds. First, because the AI Guidance contains new substantive rules on the copyrightability of the entire class of AI-generated works, requiring applicants to disclose and to disclaim all AI-generated works from registration, the Copyright Office’s failure to hold a period of notice and comment before issuing the new AI Guidance likely violated the Administrative Procedure Act. More fundamentally, the Copyright Office’s newfound requirement of the so-called “traditional elements of authorship”—a term that no federal court has ever recognized in the history of copyright law—finds no support in the Constitution, the Copyright Act, or the Supreme Court’s precedents. Not only is such a rigid approach limiting copyright to “traditional” authorship contrary to the text of the Progress Clause and the Framers’ rejection of restricting “Authors” to “literary Authors,” it also threatens to disadvantage U.S. creators the most, at a time when other countries are vying to upend the United States as the world leader in AI development. The federal courts should give no deference to and ultimately reject the Copyright Office’s erroneous rule of “traditional elements of authorship.” The Office’s mistaken approach is contrary to the Progress Clause and the Supreme Court’s precedents on “Authors,” which includes authorship that lies in a minimally creative selection or arrangement of elements. The Copyright Office has no authority to ratchet up this constitutional standard.

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TL/DR

- Copyright Office likely **violated** Administrative Procedure Act by failing to hold notice + comment before issuing its AI Guidance
- Copyright Office's new rule of "**traditional elements of authorship**" is contrary to the **Progress Clause**
- Copyright Office's new rule **hurts U.S.** creators the most
- Courts should reject Copyright Office's rule of "**traditional elements of authorship**"

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